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IN THE

Supreme Court of the United States

B.C. FOREMAN, IDA CLARK, OTIS TARVER, LOUIS DAVIS, and MANDY PESINA,

Petitioners,

v.

DALLAS COUNTY, TEXAS; COMMISSIONERS COURT OF DALLAS COUNTY, TEXAS; LEE F. JACKSON, Dallas County Judge; JIM JACKSON, JOHN WILEY PRICE, MIKE CANTRELL, and KENNETH MAYFIELD, Dallas County Commissioners; and BRUCE SHERBET, Elections Administrator of Dallas County, Texas,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court's decision in *Farrar v. Hobby*, 506 U.S. 103 (1992), repudiated the "catalyst theory" for determining whether a civil-rights plaintiff is a "prevailing party" eligible to recover attorneys' fees.

2. Whether plaintiffs who brought an enforcement action under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, "prevail[ed]" and hence became eligible to recover attorneys' fees under Section 14(e) of the Act, *id.* § 1973*l*(e), when they succeeded in forcing the defendants to replace a voting procedure that was racially and ethnically discriminatory and had not been precleared under Section 5 with a new voting procedure that is not discriminatory and has been precleared.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners seek review of a decision of the United States Court of Appeals for the Fifth Circuit reversing an award of attorneys' fees under Section 14(e) of the Voting Rights Act, 42 U.S.C. § 1973*l*(e).[1]

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[1] All parties in the court below are listed in the caption, except for Dominic De La Cruz, a plaintiff below who is now deceased.

OPINIONS BELOW

The Court of Appeals' opinion is reported at 193 F.3d 314 (5th Cir. 1999) and reprinted at Pet. App. 1a, and its order denying rehearing is reprinted at Pet. App. 50a. The District Court's opinion and order granting the plaintiffs' motion for an award of attorneys' fees is reprinted at Pet. App. 34a.

JURISDICTION

The Court of Appeals issued its decision on October 14, 1999, and its order denying a timely petition for rehearing on November 9, 1999. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 5 of the Voting Rights Act of 1965, 79 Stat. 439, as amended, 42 U.S.C. § 1973c, is reprinted at Pet. App. 52a. Section 14(e) of the Voting Rights Act, 89 Stat. 404 (1975), 42 U.S.C. § 1973*l*(e), is reprinted at Pet. App. 54a. Section 32.002(c) of the Texas Election Code, as amended in 1997, Tex. Elec. Code Ann. § 32.002(c) (West Supp. 1998), is reprinted at Pet. App. 55a.

STATEMENT

Six African-American and Hispanic citizens brought a successful enforcement action under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, which forced the defendant Dallas County to implement a new, nondiscriminatory procedure for appointing precinct election judges. The District Court held that the plaintiffs were "prevailing parties" within

the meaning of the Act and ordered Dallas County to pay them reasonable attorneys' fees. A divided panel of the Court of Appeals for the Fifth Circuit reversed. The Fifth Circuit's decision misread this Court's precedents and exacerbated an existing conflict among the circuits – a circuit split that this Court expressly recognized (but did not resolve) earlier this Term, in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 120 S. Ct. 693, 711-12 (2000) (citing cases). *See infra* page 13-14 and note 6. This Court should grant certiorari now to resolve that circuit split.

Like other political subdivisions of the State of Texas, defendant Dallas County, because of its history of discriminatory voting practices, is a jurisdiction covered by Section 5 of the Voting Rights Act. *See* 42 U.S.C. §§ 1973b, 1973c; 28 C.F.R. Pt. 51, App. It therefore may not implement any change in a "standard, practice, or procedure with respect to voting" without first obtaining either administrative preclearance from the Attorney General or judicial preclearance from the United States District Court for the District of Columbia. 42 U.S.C. § 1973c. A proposed voting change can be precleared only if the covered jurisdiction proves that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or [membership in a language minority group]." *Id. See generally Lopez v. Monterey County*, 119 S. Ct. 693, 696-97 (1999).

The issue in this case involved the methods that Dallas County used to select precinct election judges – officials who supervise polling places on election days. Between November 1, 1972, when Texas and its political subdivisions first became covered jurisdictions under Section 5, and October 3, 1996, when plaintiffs filed this case, Dallas County changed its procedures for selecting and appointing election judges at least

twice,[2] but never sought preclearance for any of these voting changes. Pet. App. 3a. In September 1996, Dallas County adopted a new appointment procedure that caused at least 75 African-American and Hispanic election judges, including the six plaintiffs in this case, to lose their positions. *See* Pet. App. 5a.

After Dallas County refused to seek preclearance of this new method, the plaintiffs filed a Section 5 enforcement action in the United States District Court for the Northern District of Texas. Pet. App. 4a, 18a-19a, 36a. Plaintiffs sought to block Dallas County from implementing the new, unprecleared method and to force it to adopt a racially and ethnically nondiscriminatory, precleared method in its place. Pet. App. 4a, 19a, 31a, 35a. Within a year, plaintiffs achieved precisely those goals and were reappointed as election judges, along with several dozen other African-American and Hispanic citizens. *See* Pet. App. 6a & n.3, 27a, 38a & n.3.

On October 3, 1996, the day they filed their original complaint, the plaintiffs won a temporary restraining order (TRO) from the District Court, which prevented the defendants from implementing their unprecleared September 1996 method for appointing election judges. Pet. App. 4a, 19a, 27a-30a, 36a, 39a-40a. On October 8, 1996, just five days after the District Court issued the TRO, Dallas County rescinded the September 1996 method and replaced it with a new method, which it also

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[2] The record in this case does not disclose how Dallas County appointed election judges before 1983, so it is unclear how many times, if any, the procedures changed between 1972 and 1983. *See* Brief for United States as Amicus Curiae at 2-3, *Foreman v. Dallas County*, 521 U.S. 979 (1997) (*per curiam*) (Nos. 96-987 & 96-1389). The parties stipulated that Dallas County changed its appointment procedures in August 1995 and in September 1996. *See id.* at 4-5. And, since the filing of this suit, it changed them again two more times. *See infra* pages 4-5.

refused to submit for preclearance. Pet. App. 4a-5a, 19a-20a, 37a. Plaintiffs therefore amended their complaint to challenge the latest unprecleared method. Pet. App. 5a, 20a, 37a.

The three-judge District Court denied plaintiffs' motion for a preliminary injunction and later dismissed their amended complaint for failure to state a claim upon which relief could be granted. Pet. App. 5a, 20a, 32a. But the plaintiffs prevailed again when they appealed the dismissal and won a decision from this Court, which required Dallas County to obtain Section 5 preclearance before implementing any new method for selecting and appointing election judges. *Foreman v. Dallas County*, 521 U.S. 979, 980-81 (1997) (*per curiam*) (vacating the District Court's dismissal of plaintiffs' amended complaint), Pet. App. 31a; *see also* Pet. App. 27a. Because the record was silent on the precise procedures Dallas County had used to appoint election judges when it became a covered jurisdiction in 1972 – a potentially dispositive fact under Section 5 – this Court remanded the case for further proceedings. Pet. App. 20a n.2, 33a.

While the case was on remand, a new Texas statute took effect. Tex. Elec. Code Ann. § 32.002(c) (West Supp. 1998), Pet. App. 55a. The statute mandated that all Texas counties use a new, nondiscriminatory method for appointing election judges. The Attorney General precleared the statute on September 2, 1997, and Dallas County reappointed the plaintiffs as election judges five weeks later. Pet. App. 6a & n.3, 27a, 38a & n.3. Thus, the plaintiffs achieved their ultimate goal – the replacement of a procedure that was racially and ethnically discriminatory and had not been precleared with one that was nondiscriminatory and had been precleared. The plaintiffs' success largely mooted the litigation, *see* Pet. App. 2a, 6a, 20a-21a, 40a, but raised the issue whether Dallas County should pay the fees for the plaintiffs' attorneys.

Pursuant to Section 14(e) of the Voting Rights Act, 42 U.S.C. § 1973*l*(e),[3] the plaintiffs moved for an award of attorneys' fees, expenses, and costs, totaling roughly $183,000. Pet. App. 34a-35a. The plaintiffs filed four affidavits demonstrating that their lawsuit had been the "catalyst" for the introduction and passage of the new Texas statute requiring Dallas County to alter its method for appointing election judges. Pet. App. 56a, 61a, 65a, 70a. Three affiants were members of the Legislature, including the bill's Senate sponsor (who represented part of Dallas County) and the bill's House sponsor (who chaired the Committee on Elections). Pet. App. 23a-24a, 43a-45a. The fourth affiant was a Democratic Party official who had testified in favor of the bill at a Texas Senate hearing and had specifically cited this litigation as a reason for enacting the bill. Pet. App. 70a; *see also* Pet. App. 25 n.3. The affidavits explained that the Texas Legislature had decided to enact the new procedure as a result of the plaintiffs' suit. Pet. App. 23a-24a, 43a-45a. Dallas County filed no counter-affidavits from other legislators or hearing witnesses. It merely pointed out that, in 1995, a similar bill had been introduced and had passed in the Texas House of Representatives. Pet. App. 24a-25a, 27a, 47a. That bill, however, died in the Texas Senate, and no other such bill was introduced until *after* the plaintiffs brought this suit and obtained a TRO. Pet. App. 14a & n.7, 25a.

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[3] Section 14(e) provides, in full: "In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1973*l*(e); *see also Morse v. Republican Party*, 972 F. Supp. 355, 358-61 (W.D. Va. 1997) (three-judge court) (awarding attorneys' fees under Section 14(e) to prevailing plaintiffs in a Section 5 enforcement action).

On June 25, 1998, the District Court granted in full the plaintiffs' motion for attorneys' fees. Pet. App. 34a, 49a. The judge – who had sat on the three-judge District Court as well – held that the plaintiffs were the "prevailing part[ies]" within the meaning of Section 14(e) because they had prevailed in obtaining a TRO and because their lawsuit had been "a substantial factor or a significant catalyst in causing the Texas Legislature to enact [the statute requiring Dallas County] to alter its method for appointing election judges." Pet. App. 34a; *see also Friends of the Earth*, 120 S. Ct. at 711 (explaining that, under the "catalyst theory," a "plaintiff can be a 'prevailing party' for purposes of [a fee-shifting statute] if it was the 'catalyst' that triggered a favorable outcome"). The court also found that the plaintiffs' attorneys had charged reasonable hourly rates and that the total sum requested was "amply supported by the record." Pet. App. 48a.

On appeal, a divided panel of the Fifth Circuit reversed the award of attorneys' fees and, rather than remand the case to the District Court, "render[ed] judgment that the plaintiff's [*sic*] take no attorney's fees." Pet App. 2a. The opinion of the two-judge majority did not question the reasonableness of the award, but instead held that the plaintiffs – who had not formally obtained a consent decree, a settlement agreement, or an enforceable final judgment against Dallas County – had not "prevail[ed]." Pet. App. 10a-11a, 15a.

The court began its discussion of "prevailing party" status by quoting extensively from this Court's opinion in *Farrar v. Hobby*, 506 U.S. 103 (1992), a case involving a plaintiff who had received an enforceable final judgment but only for nominal damages, *see id.* at 105, 107. Pet. App. 7a-10a. Although the majority opinion expressly invoked *Farrar* 17 times, Pet. App. 7a-15a, it never mentioned or even alluded to *Farrar*'s actual holding – that the plaintiff, who had received

only one dollar in nominal damages, was nonetheless a "prevailing party" eligible to recover attorneys' fees. *Farrar*, 506 U.S. at 105, 112, 116. Instead, the court stated that *Farrar* "seemed to *narrow* the circumstances in which a party may claim prevailing party status." Pet. App. 9a (emphasis added). The court based that conclusion on a few lines of dicta from *Farrar* that arguably implied that a plaintiff could be deemed a "prevailing party" only if he became "'entitled to enforce a *judgment, consent decree, or settlement* against the defendant.'" Pet. App. 9a (quoting *Farrar*, 506 U.S. at 113 (dicta)) (emphasis added by the court below); *see also Farrar*, 506 U.S. at 111 ("The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought . . . or comparable relief through a consent decree or settlement . . . .") (citations omitted) (dicta), *quoted in* Pet. App. 9a.

Having elevated those dicta to a "guiding principle[]," Pet. App. 7a, the court then went on to address at some length Dallas County's argument that "prevailing party status can no longer be based on a catalyst theory after the Supreme Court's decision in *Farrar*." Pet. App. 8a. The "catalyst theory," the court explained, had been "routinely applied" in the 1980s and early 1990s to allow "a plaintiff to achieve prevailing party status – even in the absence of a formal victory in court – if the plaintiff's suit was a 'substantial factor or a significant catalyst' in obtaining the relief sought." Pet. App. 8a (quoting *Williams v. Leatherbury*, 672 F.2d 549, 550-51 (5th Cir. 1982)).

The court asserted that *Farrar* had placed "the continuing validity of the catalyst theory . . . in serious doubt" and that *Farrar*'s language (the dicta quoted above) was "seemingly at odds with the catalyst theory" and had "led at least one court to conclude that *Farrar* has swept the catalyst theory into the judicial trash heap." Pet. App. 8a-9a (citing *S-1 & S-2 v. State Bd. of Educ.*, 21 F.3d 49, 51 (4th Cir.) (*en banc*) (*per curiam*),

cert. denied, 513 U.S. 876 (1994)). The Fourth Circuit opinion that the court cited was a 7-to-6 *en banc* decision expressly overruling the catalyst theory and holding that a plaintiff may only qualify as a "prevailing party" by virtue of "having obtained an enforceable judgment, consent decree, or settlement giving some of the legal relief sought." *S-1 & S-2*, 21 F.3d at 51 (citing *Farrar*, 506 U.S. at 111-13).[4]

The court below recognized that at least five other circuits had expressly disagreed with the Fourth Circuit, but noted that the question remained open in the Fifth Circuit. Pet. App. 9a-10a (citing cases). Rather than expressly addressing the question, the court said it would "[a]ssum[e], without deciding, that the catalyst theory still applies in th[e Fifth] Circuit." Pet. App. 10a; *see* Pet. App. 15a.

Having thus skirted the "potential conflict between the catalyst theory and *Farrar*," Pet. App. 10a, the majority below purported to apply the catalyst theory to the facts of the case and ruled against the plaintiffs. *First*, the court held that a TRO cannot make a plaintiff a prevailing party because it is not "a final remedy" and it does not provide "'actual relief on the merits.'" Pet. App. 15a (quoting *Farrar*, 506 U.S. at 111).

Second, the court held that the plaintiffs did not in fact obtain the relief they sought in their lawsuit. Pet. App. 11a-12a. It stated that the plaintiffs' complaint requested four specific forms of declaratory and injunctive relief under Section

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[4] The Fourth Circuit, sitting *en banc*, vacated the panel's decision, and the seven-judge majority adopted as its own the dissenting panel opinion of Judge Wilkinson. *See S-1 & S-2*, 21 F.3d at 51 (adopting *S-1 & S-2 v. State Bd. of Educ.*, 6 F.3d 160, 168-72 (4th Cir. 1993) (Wilkinson, J., dissenting)). The six dissenting judges adopted Judge Phillips' opinion for the panel majority. *See id.* (adopting *S-1 & S-2*, 6 F.3d at 161-68 (Phillips, J.)).

5 of the Voting Rights Act and did not expressly ask Dallas County to adopt a new method for appointing election judges. Pet. App. 11-12a. The court stated "that the relief sought by the plaintiffs' suit, i.e., preclearance by the Department of Justice of a change in voting procedures, is entirely separate and distinct from . . . a substantive change in the procedure for selecting [election] judges." Pet. App. 14a n.7; *see also id.* at 12a (referring to the latter as perhaps one of plaintiffs' "hidden motives"). That Dallas County adopted a new procedure for selecting election judges was immaterial, the court explained, because the plaintiffs never received the permanent injunction or the specific declaratory judgments requested in their complaint. Pet. App. 11a-12a. Thus, the court reasoned, "the plaintiffs went home empty handed . . . [and] received none of the substantive relief for which they originally filed suit." Pet. App. 11a.

Third, the court held that, even assuming the plaintiffs obtained the relief they sought, there was insufficient evidence of a causal connection between their lawsuit and the Texas Legislature's decision to revamp the procedures for appointing election judges in Dallas County. Pet. App. 12a-15a. That is, the plaintiffs had not proved that "the lawsuit itself, as a discrete event," was "'a substantial factor or a significant catalyst'" in achieving the relief sought. Pet. App. 11a, 13a (quoting *Robinson v. Kimbrough*, 652 F.2d 458, 466 (5th Cir. 1981)). The court explained that it would be "a formidable task" for *any* plaintiff to prove that his lawsuit "was the catalyst behind the passage of general legislation" because "the legislative process is fraught with compromises, competing concerns, and unspoken motives." Pet. App. 13a. Therefore, the court held, three affidavits from state legislators who introduced and fought for passage of the bill – even if uncontradicted by any counter-affidavits or other substantive evidence – could not prove that a lawsuit had been a *substantial*

factor in a legislature's decision. Pet. App. 13a-14a.

In dissent, Judge Stewart argued that the majority had not applied the catalyst theory properly and had failed to accord "broad discretion" to "the district court's superior understanding of the litigation." Pet. App. 17a.

As for the TRO, Judge Stewart argued that the plaintiffs, within five days of filing their suit, had successfully induced Dallas County to abandon its September 1996 method for appointing election judges. Pet. App. 19a. It was irrelevant, Judge Stewart explained, that the plaintiffs achieved this goal through a TRO rather than through a declaratory judgment that the September 1996 method was legally unenforceable. Pet. App. 19a, 26a-27a.

As for the plaintiffs' obtaining the relief they sought in their amended complaint, Judge Stewart noted that this Court had agreed with plaintiffs that procedures for appointing election judges are subject to Section 5's preclearance requirement; that the Texas Legislature had sought and obtained preclearance of a statute requiring new appointment procedures; that the Texas statute had forced Dallas County "to implement a system of selection which was precleared" under Section 5; and that the plaintiffs had all been reappointed to their offices. Pet. App. 19a-21a. Thus, the plaintiffs had in fact obtained the relief they sought. Pet. App. 26a-27a.

Finally, Judge Stewart rejected the majority's analysis of the causation issue because "*all* the substantive evidence presented to the district court [demonstrated that] this new legislation was catalyzed by the plaintiffs' lawsuit." Pet. App. 27a (emphasis added); *see* Pet. App. 56a-74a. He explained that, in denying any weight to the affidavits of the three Texas legislators, the majority had confused legislative *intent*, that is, the interpretation of a statute's meaning – a question best

answered by the statute's plain text – with legislative *motive*, the relevant inquiry here. Pet. App. 21a-23a. In attempting to determine whether a lawsuit *motivated* the introduction and passage of a piece of legislation, the text will rarely answer the question; but affidavits from legislative sponsors can provide powerful evidence, Judge Stewart explained. Pet. App. 23a. Wholesale rejection of affidavits about legislative motive would be tantamount, Judge Stewart suggested, to "holding that a party can *never* conclusively establish that a lawsuit is a catalyst for legislation." Pet. App. 23a (emphasis added). "It is important to note," Judge Stewart wrote, "that the defendants offered no affidavits or evidence that contradicted the sworn testimony of [the] three Texas legislators who all clearly stated that the present lawsuit was a significant factor in the introduction and passage of the legislation which forced [Dallas County] to adopt the precleared . . . method for appointing election judges." Pet. App. 24a-25a. Finally, Judge Stewart took the majority to task for ignoring the plaintiffs' fourth affidavit, in which a party official recounted his testimony at a Texas Senate hearing "specifically cit[ing] this litigation as a reason for the Senate to adopt the bill." *See* Pet. App. 25a-26a n.3.

REASONS FOR GRANTING THE WRIT

The decision below conflicts with decisions of this Court and of almost every other Court of Appeals, with the exception of the Fourth Circuit. The case hinges on an important interpretive issue – the proper definition of the term "prevailing party," which appears in numerous federal fee-shifting statutes.[5]

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[5] *See Ruckelshaus v. Sierra Club*, 463 U.S. 680, 684 & n.3 (1983) (listing statutes authorizing fee awards to the "prevailing party"); *id.* at 701

(continued...)

Although this Court has repeatedly given that term a broad reading consistent with congressional intent, a few lines of dicta in the most recent opinion, *Farrar v. Hobby*, 506 U.S. 103, 111, 113 (1992), have led the Fourth Circuit and now the Fifth Circuit to go astray by effectively holding that a plaintiff cannot "prevail" unless he obtains an enforceable final judgment, consent decree, or settlement agreement. As this Court acknowledged earlier this Term, that interpretation squarely conflicts with the decisions of seven Courts of Appeals that "have expressly concluded that *Farrar* did not repudiate the catalyst theory" and two "[o]ther Courts of Appeals [that] have likewise continued to apply the catalyst theory notwithstanding *Farrar*." *Friends of the Earth*, 120 S. Ct. at 711 (citing cases in the First, Second, Third, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits[6]); *see also*

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[5](...continued)
n.12 (Stevens, J., dissenting) (same); *cf. Marek v. Chesney*, 473 U.S. 1, 43-51 (1985) (Brennan, J., dissenting) (listing 119 federal statutes authorizing court-awarded attorneys' fees).

[6] *Marbley v. Bane*, 57 F.3d 224, 234 (2d Cir. 1995) (expressly concluding that *Farrar* did not repudiate the catalyst theory); *Baumgartner v. Harrisburg Hous. Auth.*, 21 F.3d 541, 546-50 (3d Cir. 1994) (same); *Zinn v. Shalala*, 35 F.3d 273, 276 (7th Cir. 1994) (same); *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist., #1*, 17 F.3d 260, 263 n.2 (8th Cir. 1994) (same); *Kilgour v. City of Pasadena*, 53 F.3d 1007, 1010 (9th Cir. 1995) (same); *Beard v. Teska*, 31 F.3d 942, 951-52 (10th Cir. 1994) (same); *Morris v. City of West Palm Beach*, 194 F.3d 1203, 1207 (11th Cir. 1999) (same); *see Paris v. United States Dep't of Hous. & Urban Dev.*, 988 F.2d 236, 238 (1st Cir. 1993) (applying the catalyst theory notwithstanding *Farrar*); *Citizens Against Tax Waste v. Westerville City Sch.*, 985 F.2d 255, 257 (6th Cir. 1993) (same); *see also Maduka v. Meissner*, 114 F.3d 1240, 1241 (D.C. Cir. 1997) (*per curiam*) (holding that a plaintiff had not "prevailed" because his lawsuit was not "a catalytic, necessary or substantial factor" in obtaining the relief for which he filed his lawsuit). *But see S-1 &*
(continued...)

id. (quoting the Fifth Circuit's majority opinion in this case, and citing the Fourth Circuit's *en banc* decision in *S-1 & S-2*, 21 F.3d at 51). Having percolated in the lower courts for seven years, the question whether *Farrar* effectively repudiated the catalyst theory is now ripe for this Court's disposition. In *Friends of the Earth*, this Court recognized the importance of that question, but declined to address it because the district court in that case had neither denied nor awarded attorneys' fees to the plaintiffs. *Friends of the Earth*, 120 S. Ct. at 711-12. By contrast, this case squarely presents the question.

I. THE FIFTH CIRCUIT'S RULING EFFECTIVELY PRECLUDES RELIANCE ON THE CATALYST THEORY AND THUS SQUARELY CONFLICTS WITH RULINGS OF MOST OTHER CIRCUITS.

Although the majority below purported to assume the continued validity of the catalyst theory, its reasoning effectively bars any award of attorneys' fees to a plaintiff who has not received a final judgment awarding the precise relief sought in the complaint. As the District Court and the dissent below recognized, *see* Pet. App. 17a-27a, 34a-49a, if there were ever a case in which the plaintiffs should be awarded fees under the catalyst theory, this was such a case. But the Court of Appeals overturned the fee award in a manner that will ensure that no plaintiff in the Fifth Circuit will ever succeed in obtaining fees on the basis of the catalyst theory. It follows that this case presents the Court with an opportunity to resolve the conflict among the circuits on this important question.

The court below made three erroneous holdings. *First*, the

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[6](...continued)
S-2, 21 F.3d at 51.

court held that a TRO can never be a basis for a finding of prevailing-party status because it is not a final adjudication on the merits. *See* Pet. App. 14a-15a. But that ruling is not only contrary to the intent of Congress, *see infra* pages 20-21 – it also amounts to a ruling that the catalyst theory is a dead letter. After all, in many cases, preliminary relief will lead defendants to rectify their conduct permanently. Here, for example, Dallas County abandoned the September 1996 selection method that was the subject of the TRO – albeit replacing it with another method that was then challenged in an amended complaint. But the Court of Appeals has held that, no matter how significant the effects of preliminary relief may be on the conduct of defendants, a final order is required.

By contrast, the majority view is that a "final remedy" is not a prerequisite for "prevailing party" status. The practicality of the majority view is particularly apparent in voting-rights cases. When a State or county threatens to adopt a discriminatory procedure for an upcoming election, a TRO or preliminary injunction blocking that procedure is often the only meaningful relief plaintiffs can seek, as there typically is not enough time before the election to litigate the case to a final conclusion on the merits. In those circumstances, federal courts applying the catalyst theory have not hesitated to award fees to voting-rights plaintiffs *solely* on the basis of their having obtained *non*final relief such as a TRO or a preliminary injunction. *See, e.g.*, *Maloney v. City of Marietta*, 822 F.2d 1023, 1024-27 (11th Cir. 1987) (holding that plaintiffs in a Section 5 enforcement action were "prevailing parties" because they received a TRO that induced the defendant city to seek preclearance for its new election ordinance, even though the ordinance proved to be nondiscriminatory and therefore *was* precleared); *Garcia v. Guerra*, 744 F.2d 1159, 1161-66 (5th Cir. 1984) (reversing a denial of attorneys' fees where plaintiffs in a Section 5 enforcement action got no formal relief other

than a TRO restraining the county from holding the election on an unprecleared date when Hispanic farm workers would be unable to go to the polls), *cert. denied*, 471 U.S. 1065 (1985).[7]

Second, the court below held that plaintiffs did not prevail on the claims stated in their amended complaint (challenging the selection procedure adopted after the TRO) because they did not obtain precisely the same relief they had sought from the District Court – a formal order requiring preclearance of the challenged selection method. *See* Pet. App. 11a-12a. But here again, that ruling is utterly inconsistent with the Fifth Circuit's purported assumption that a catalyst theory can be valid.

In every practical sense, the plaintiffs prevailed. They successfully forced Dallas County to replace an election procedure that was racially and ethnically discriminatory and that had not been *submitted* for preclearance, let alone precleared, with one that is nondiscriminatory and has been submitted and precleared. That change in election procedure directly and "materially alter[ed] the legal relationship" between Dallas County and the plaintiffs, as the County quickly reappointed several dozen African-American and Hispanic election judges, including the plaintiffs. *Farrar*, 506 U.S. at 111 (citing *Texas State Teachers Ass'n v. Garland Ind. Sch. Dist.*, 489 U.S. 782, 792-93 (1989)). These are precisely the benefits the plaintiffs sought in bringing their Section 5 enforcement action. *Cf. Farrar*, 506 U.S. at 109-13; *Garland*, 489 U.S. at 791-92; *Rhodes v. Stewart*, 488 U.S. 1, 4 (1988) (*per curiam*); *Hewitt v. Helms*, 482 U.S. 755, 760-61, 763 (1987); *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). The County's change in conduct redressed the plaintiffs' grievances

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[7] *See also National Black Police Ass'n v. District of Columbia Bd. of Elections & Ethics*, 168 F.3d 525, 527-29 (D.C. Cir. 1999); *Haley v. Pataki*, 106 F.3d 478, 483-84 (2d Cir. 1997).

no less than if the District Court had formally entered an enforceable final judgment against Dallas County. *Cf. Rhodes*, 488 U.S. at 4; *Hewitt*, 482 U.S. at 760-61. Only 12 months after filing their lawsuit, the plaintiffs had obtained "essentially complete relief." *Hensley*, 461 U.S. at 431; *see also Farrar*, 506 U.S. at 111.

In the course of that year, the plaintiffs were successful in the courtroom, as well as in the legislative arena. They obtained first a TRO that blocked Dallas County from implementing an unprecleared election procedure, Pet. App. 28a-30a, and then an opinion from this Court holding that changes in that election procedure were, contrary to Dallas County's contention, subject to Section 5 of the Voting Rights Act. Pet. App. 31a-33a.[8] Thus, on their principal claim – that changes in the method for appointing election judges had to be precleared – the plaintiffs prevailed on the merits, in the highest Court in the land. *Cf. Farrar*, 506 U.S. at 109, 111-12; *Garland*, 489 U.S. at 791-92; *Hewitt*, 482 U.S. at 758; *Hensley*, 461 U.S. at 434. There can be no doubt that the plaintiffs vindicated their rights under Federal law. *Cf. Farrar*, 506 U.S. at 111; *Garland*, 489 U.S. at

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[8] This Court's June 1997 decision was unequivocal: Any new method that Dallas County adopted for selecting and appointing election judges would be subject to Section 5's preclearance requirement. This Court vacated and remanded, rather than reversed, only to allow Dallas County an opportunity to prove that its October 1996 method was the same as its November 1972 method – a purely factual point unaddressed in the record. Pet. App. 33a. But the County's *September* 1996 method differed from *all* previous methods. Therefore, Dallas County clearly violated the Voting Rights Act when it failed to seek preclearance of the September 1996 method. *See Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 418 (1978).

793.[9]

Thus, the plaintiffs served the "private attorney general" role that Congress meant to promote when it enacted Section 14(e) of the Voting Rights Act. *See* S. Rep. No. 94-295, at 40 (1975) [hereinafter S. Rep.], *reprinted in* 1975 U.S.C.C.A.N. 774, 807; *see also Garland*, 489 U.S. at 793. Because they prevailed on the significant issues in their litigation and obtained the relief they sought, the plaintiffs are "prevailing parties" within the meaning of Section 14(e). *See Farrar*, 506 U.S. at 109; *Garland*, 489 U.S. at 791-93; *Hewitt*, 482 U.S. at 760; *Hensley*, 461 U.S. at 433. The Fifth Circuit's contrary decision – based on the plaintiffs' failure to obtain a final judgment before the case was rendered moot by remedial legislation – amounts to a complete repudiation of the catalyst theory.

Third, the court below held that uncontradicted affidavits from key players in the Texas Legislature stating that this lawsuit was the catalyst of the legislative remedy were not sufficient proof of causation. *See* Pet. App. 12a-14a. That ruling means, in effect, that it is impossible -- as a matter of law – to demonstrate the motive of a legislature in passing a law that mooted a civil-rights suit by providing all the relief sought. As the dissent below recognized, if plaintiffs cannot demonstrate legislative motivation through uncontradicted sworn testimony, "a party can *never* conclusively establish that a lawsuit is a catalyst for legislation." Pet. App. 23a (emphasis

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[9] In *Brooks v. Georgia State Board of Elections*, 997 F.2d 857 (11th Cir. 1993), the court affirmed an award of fees not only for the time that plaintiffs' counsel spent litigating the Section 5 enforcement action, but also for the time spent opposing administrative preclearance, because the latter work was "crucial to the vindication of [plaintiffs'] rights." *Id.* at 864 (citing *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 561 (1986)).

added).[10]

In so ruling, the Fifth Circuit not only effectively barred catalyst claims but also created an additional, more specific circuit conflict. In a comparable case, the Third Circuit expressly relied on an affidavit from a legislator in determining that a lawsuit had been an important catalyst in the enactment of legislation. *See, e.g., Institutionalized Juveniles v. Secretary of Pub. Welfare*, 758 F.2d 897, 916-17 & nn.30-31 (3d Cir. 1985) (relying on a former state senator's affidavit and upholding a fee award).

If, to qualify as a prevailing party, a civil-rights plaintiff must triumph in a "final" order, must obtain precisely the relief requested in his complaint, and cannot rely on uncontradicted testimony from key legislators to prove that his lawsuit induced remedial legislation, then nothing remains of the catalyst theory. It is now as dead in the Fifth Circuit as it has been for years in the Fourth Circuit.

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[10] In his dissent, Judge Stewart also correctly observed that "*all* the substantive evidence presented to the district court [had demonstrated that] this new legislation was catalyzed by the plaintiffs' lawsuit." Pet. App. 27a (emphasis added); *see* Pet. App. 22a-27a. Plaintiffs' four affidavits – from three legislators and one hearing witness – were unambiguous and uncontradicted. Pet. App. 23a-24a, 25a n.3. Dallas County offered no counter-affidavits. Its only factual argument was that a similar bill had been introduced in 1995. But the fact that the 1995 bill died and the 1997 bill passed only *strengthens* the conclusion that the 1997 enactment was catalyzed by the lawsuit filed in 1996. *See* Pet. App. 25a; *see also* Pet. App. 67a.

Given the County's failure here to raise a genuine issue as to any material fact, the court below apparently resolved the causation issue as a matter of law, and hence its ruling should be reviewed *de novo*. *See* Pet. App. 6a.

II. THE CONFLICT OVER THE CATALYST THEORY SHOULD BE RESOLVED NOW.

In the wake of the ruling below, in two circuits civil-rights plaintiffs can lose their eligibility for attorneys' fees simply because defendants acquiesce to their demands "voluntarily" before a formal adjudication is obtained. In at least nine other circuits, precisely the opposite rule applies. *See supra* page 13 and note 6.[11] This conflict needs resolution now, for two reasons.

First, it makes no sense to allow such a conflict to continue to exist. Congress has made available attorneys' fees for prevailing plaintiffs in civil-rights cases based on a recognition that these plaintiffs serve to protect and vindicate fundamental rights and liberties. Like other civil-rights fee-shifting provisions, Section 14(e) of the Voting Rights Act was enacted because "Congress depends heavily upon private citizens to enforce the fundamental rights involved" and "[f]ee awards are a necessary means of enabling private citizens to vindicate these Federal rights." S. Rep., *supra*, at 40, *reprinted in* 1975 U.S.C.C.A.N. at 807. Congress limited the recovery of fees to "prevailing parties," however, to "filter out meritless cases." *Marbley v. Bane*, 57 F.3d 224, 233 (2d Cir. 1995).

As this case illustrates, there are many cases in which the relief at stake, while important, is nonpecuniary and therefore the plaintiffs might be unable to hire adequate counsel absent a chance of fee-shifting. *See City of Riverside v. Rivera*, 477

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[11] Misreadings of *Farrar*'s dicta continue to spawn confusion in the lower courts. Recently, the Seventh Circuit indicated that it also may be reconsidering the validity of the catalyst theory in light of *Farrar*. *See, e.g.*, *Board of Educ. of Oak Park v. Nathan R. ex rel. Richard R.*, 199 F.3d 377, 382 (7th Cir. 2000) (possibly creating an intracircuit split with *Zinn v. Shalala*, 35 F.3d at 276).

U.S. 561, 574-80 (1986) (plurality opinion); *id.* at 594-95 (Rehnquist, J., dissenting). Because of the importance of this area of the law, the Court should be especially attentive to the need to maintain consistency among the circuits.

Second, on the merits, the position of the Fourth and Fifth Circuits is plainly contrary to the intent of Congress. Given the importance that Congress attached to the vindication of fundamental Federal voting rights, defendants' strategic avoidance of court-awarded fees had to be checked: "[I]f defendants could deprive plaintiffs of attorneys' fees by unilaterally mooting the underlying case by conceding to plaintiffs' demands, attorneys might be more hesitant about bringing these civil rights suits, a result inconsistent with Congress' intent . . . ." *Baumgartner v. Harrisburg Hous. Auth.*, 21 F.3d 541, 548 (3d Cir. 1994).

Congress therefore authorized fee awards not only for plaintiffs who prevail in a formal, final judgment on the merits, but also for plaintiffs who vindicate their civil rights either by prevailing "on an important matter *in the course of litigation*" or by obtaining *informal* relief. S. Rep., *supra*, at 41 (emphasis added), *reprinted in* 1975 U.S.C.C.A.N. at 808; *see also Garland*, 489 U.S. at 791-92 (recognizing that Congress has authorized *interim* fee awards *pendente lite*); *Missouri v. Jenkins*, 491 U.S. 274, 283 n.6 (1989) (same). Congress certainly knew how to restrict fee awards to plaintiffs who have won a final judgment. *See, e.g.*, 33 U.S.C. § 1365(d) (authorizing the award of attorneys' fees only by courts issuing a "final order"). But Congress deliberately chose not to do so in the context of civil rights. *See, e.g.*, 42 U.S.C. §§ 1973*l*(e), 1988(b).

Prior to *Farrar*, this Court repeatedly recognized that Congress intended to allow civil-rights plaintiffs to obtain fees when they prevail without obtaining a formal and final

judgment.[12] Just as the court below never mentioned or even alluded to *Farrar*'s actual holding, it never referred to any of the precedents that the *Farrar* Court itself had cited as authoritative on the general issue of prevailing-party status. *See Farrar*, 506 U.S. at 109-14 (citing *Garland*, 489 U.S. at 790-93; *Rhodes*, 488 U.S. at 2-4; *Hewitt*, 482 U.S. at 757, 760-64; *Hensley*, 461 U.S. at 433, 436-38; *Maher v. Gagne*, 448 U.S. 122, 129 (1980)). Had the Fifth Circuit studied those cases, it would have found that each of them "either expressly or tacitly recognized the catalyst theory's viability." *S-1 & S-2 v. State Bd. of Educ.*, 6 F.3d 160, 167 (4th Cir.), *vacated and reh'g granted*, 6 F.3d at 160 (4th Cir. 1993) (*en banc*).

In *Maher v. Gagne*, 448 U.S. 122 (1980), this Court upheld an award of fees in a case that had been settled by the entry of a consent decree, without full litigation of the issues, without the plaintiff formally obtaining relief, and without any judicial determination that her rights had been violated. *See id.* at 124, 129-30.

The Court in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), then held that plaintiffs' failure to prevail on some (but not all) of their claims for relief did *not* deny them "prevailing party" status, but rather that the extent of their success should go to the proper *amount* of a reasonable fee award. *See id.* at 436-37, 440. Writing for the majority, Justice Powell explained that the Court's "generous formulation" of the term "prevailing party"

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[12] The Court's decisions deal primarily with the Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641, as amended, 42 U.S.C. § 1988 [hereinafter "Section 1988"], which was patterned after, and is textually almost identical to, Section 14(e) of the Voting Rights Act. *See Hanrahan v. Hampton*, 446 U.S. 754, 758 n.4 (1980) (*per curiam*). This Court has generally applied the same standards to Section 14(e), Section 1988, and all other federal statutes authorizing an award of fees to a "prevailing party." *See Hensley*, 461 U.S. at 433 n.7.

"brings the plaintiff only across the statutory threshold. It remains for the district court to determine what fee," if any, is "reasonable." *Id.* at 433; *see Garland*, 489 U.S. at 792 (reaffirming *Hensley*'s "generous formulation").[13]

Moreover, Justice Powell's opinion for the Court tacitly recognized the catalyst theory's viability. The Court remanded the case for a possible recalculation of the amount of the award. *See* 461 U.S. at 438-40 & 439 n.15. In doing so, Justice Powell explained that the size of the award might depend upon the plaintiffs' ability to show that their lawsuit had been the "catalyst" for the defendants' change in conduct. *Id.* at 439 n.15. Justice Powell apparently believed the catalyst theory was good law as of 1983, and no other Justice contradicted that belief.

In *Hewitt v. Helms*, 482 U.S. 755 (1987), the Court simply held that a plaintiff who had litigated to judgment, had lost on all of his claims, and had obtained nothing from the defendants was not a "prevailing party." *See id.* at 759-62. Justice Scalia's opinion for the Court recognized, however, that "[i]t is settled law, of course, that relief need not be judicially decreed in order to justify a fee award." *Id.* at 760. "A lawsuit sometimes produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment – *e.g.*, a monetary settlement *or a change in conduct that redresses the plaintiff's grievances*." *Id.* at 760-61 (emphasis added). "When that occurs," the Court explained, "the plaintiff

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[13] A "generous" definition of the term "prevailing party" creates little risk of excessively burdening governmental defendants because a prevailing plaintiff is merely *eligible* to recover attorneys' fees; he is never *entitled* to do so. The district court, in the sound exercise of its equitable discretion, may determine that only a small award is "reasonable" within the meaning of the statute. 42 U.S.C. §§ 1973*l*(e), 1988(b); *cf. Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 (1994).

is deemed to have prevailed despite the absence of a formal judgment in his favor." *Id.* at 761 (citing *Maher*, 448 U.S. at 129). "In all civil litigation," Justice Scalia continued, "the judicial decree is not the end but the means. At the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant that the judgment produces – the payment of damages, or some specific performance, or the termination of some conduct. Redress is sought *through* the court, but *from* the defendant." *Id.* at 761 (emphasis in the original). "*[I]f the defendant, under pressure of the lawsuit, alters his conduct (or threatened conduct) towards the plaintiff that was the basis for the suit, the plaintiff will have prevailed.* That is the proper equivalent of a judicial judgment which would produce the same effect . . . ." *Id.* at 761 (emphasis added).

The plaintiff in *Hewitt* also expressly raised the catalyst theory, arguing that there was a clear causal link between his lawsuit and the State's amendment of its prison regulations. *See id.* at 759, 763-64. The Court rejected that argument on the ground that the plaintiff had been released from prison long before the new regulations were promulgated and thus he "did not and could not get redress from [them]." *Id.* at 763.

One year later, the Court confronted a similar fact pattern. Both cases had been filed by prisoners seeking changes in prison policy, but unlike the plaintiff in *Hewitt*, the plaintiff in *Rhodes v. Stewart*, 488 U.S. 1 (1988) (*per curiam*), had obtained a declaratory judgment. *See id.* at 2-3. That distinction proved irrelevant. The Court held that *Rhodes* was controlled by the holding in *Hewitt* because plaintiffs in both cases had been released from prison and therefore could not get redress from any changes in prison policy caused by their lawsuits. *See id.* at 4. Because the declaratory judgment did not affect "the behavior of the defendant *toward the plaintiff*,"

it afforded him no relief whatsoever; and, in the absence of relief, the plaintiff did not "prevail" and therefore was precluded from recovering attorneys' fees. *Id.* at 4 (emphasis added).

The Court's last major decision on "prevailing party" status prior to *Farrar* was delivered by Justice O'Connor in her opinion for a unanimous Court in *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782 (1989). Like the present case, *Garland* arose in Texas and presented a circuit split in which the Fifth Circuit and one other Court of Appeals had narrowly interpreted the phrase "prevailing party," contrary to holdings of the Second, Seventh, Eighth, Ninth, and Tenth Circuits. *See id.* at 784 (citing cases). This Court reversed the Fifth Circuit's judgment and held that plaintiffs are "prevailing parties" eligible for an award of attorneys' fees if they have "succeeded on any significant issue in litigation which achieved some of the benefit the parties sought in bringing suit." *Id.* at 791-92 (citations and internal quotation marks omitted). "The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." *Id.* at 792-93. After reviewing legislative history and this Court's holding in *Hensley*, Justice O'Connor noted that Congress intended to make *interim* fee awards available to partially prevailing civil-rights plaintiffs: "A prevailing party must be one who has succeeded on any significant claim affording it some of the relief sought, either pendente lite or at the conclusion of the litigation." *Id.* at 790-91. Thus, *Garland* left no doubt that a party could "prevail" without obtaining an enforceable final judgment against the defendant. *See* S. Rep., *supra*, at 41, *reprinted in* 1975 U.S.C.C.A.N. at 808.

Finally, this Court decided *Farrar v. Hobby* in 1992. Once again, this Court granted certiorari to resolve a circuit split over the proper definition of the term "prevailing party" in a federal civil-rights fee-shifting statute. *See Farrar*, 506 U.S. at 105, 108-09 & n.2. The case also arose in Texas and the split pitted the Fourth and Fifth Circuits against the Second, Eighth, Ninth, Tenth, and Eleventh Circuits. *See id.* at 105-07, 108 n.2 (citing cases). And, as in the present case, a divided panel of the Fifth Circuit had reversed an award of attorneys' fees after holding that the plaintiffs were not "prevailing parties." *See id.* at 107-09. All nine Justices disagreed with that conclusion, and the Court held that the plaintiffs – who had sought $17 million in damages from six defendants, but had ultimately received only one dollar in nominal damages from one defendant – were nonetheless "prevailing parties." *See id.* at 105, 112, 116; *see also id.* at 116-17 (O'Connor, J., concurring); *id.* at 122-23 (White, J., concurring in part). By a vote of 5 to 4, the Court affirmed, however, on the basis that the most reasonable fee for these plaintiffs was no fee at all. *See* 506 U.S. at 114-16.

Although *Farrar* included dicta arguably implying that an enforceable judgment, consent decree, or settlement was a prerequisite for prevailing-party status, there is no reason to think the Court intended to nullify the reasoning of five recent opinions on this subject *sub silentio*. The plaintiffs in *Farrar* had obtained an enforceable final judgment against the defendant (albeit for only one dollar in nominal damages). As this Court recognized earlier this Term, *Farrar* "involved no catalytic effect," and therefore the issue of the continuing validity of the catalyst theory "was not presented for this Court's decision in *Farrar*." *Friends of the Earth*, 120 S. Ct. at 711. It seems "implausible that [this] Court meant to abolish a rule employed by nearly every circuit and previously recognized by the Court itself as 'settled law,' without expressly indicating that it was doing so." *Zinn v. Shalala*, 35

F.3d 273, 276 (7th Cir. 1994) (quoting *Hewitt*, 482 U.S. at 760); *see Baumgartner*, 21 F.3d at 547 ("We believe it is not likely that the Supreme Court would overturn such a widespread theory without even once mentioning it, particularly when it was inapplicable to the case at hand.").

This Court should grant certiorari, reaffirm the principles enunciated in *Farrar* and the precedents it cited, respect the statute's plain text, and resolve the conflict among the circuits by rejecting the position of the Fourth and Fifth Circuits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

B.C. FOREMAN; Ida Clark; Otis Tarver; Dominic De La Cruz; Louis Davis; Mandy Pesina,

Plaintiffs-Appellees,

v.

DALLAS COUNTY, TEXAS; Commissioners Court of Dallas County, Texas; Lee F. Jackson, Dallas County Judge; Jim Jackson; John Wiley Price; Mike Cantrell; Kenneth A. Mayfield, Dallas County Commissioners; Bruce Sherbet, Elections Administrator of Dallas County, Texas,

Defendants-Appellants.

No. 98-10864.

United States Court of Appeals,
Fifth Circuit.

Oct. 14, 1999.

Appeal from the United States District Court for the Northern District of Texas.

Before SMITH, DeMOSS and STEWART, Circuit Judges.

DeMOSS, Circuit Judge:

The plaintiffs-appellees, B.C. Foreman, Ida Clark, Otis Tarver, Dominic De La Cruz, Louis Davis, and Mandy Persina ("plaintiffs"), served as precinct election judges in Dallas County, Texas. The plaintiffs subsequently lost those positions when the defendants-appellants, Dallas County, the Commissioners Court of Dallas County, and other ("defendants"), adopted a new method of appointing precinct

election judges. The plaintiffs subsequently sued the defendants under § 5 of the Voting Rights Act of 1965 ("VRA"), 42 U.S.C. § 1973 *et seq.*, alleging that the defendants had not precleared the appointment method for precinct judges with the United States Department of Justice as required by statute, 42 U.S.C. § 1973c. After lengthy and protracted litigation, which included an appeal to the United States Supreme Court, *Foreman v. Dallas County, Tex.*, 521 U.S. 979 (1997) (per curiam), the suit was dismissed by a three-judge district court as moot when the Texas legislature eventually enacted a new and different appointment method. In this appeal we are asked to decide whether the district court erred in granting the plaintiffs attorney's fees as prevailing parties under 42 U.S.C. § 1973*l*(e). We reverse the district court's award of attorney's fees and render judgment that the plaintiff's take no attorney's fees.

I.

In Texas presiding election judges are assigned to local precincts and are responsible for managing the elections which occur there. *See* Tex. Elec.Code § 32.071. An election judge's responsibilities include administering oaths at polling places, preserving order and preventing breaches of the peace, and enforcing the provisions of the Texas Election Code. *See* Tex. Elec.Code §§ 32.072-.075. The alternate presiding judge serves as presiding judge for an election if the presiding judge is unable to serve. Tex. Elec. Code § 32.001(b); *Foreman v. Dallas County, Tex.*, 990 F. Supp. 505 (N.D. Tex.1998) (outlining various responsibilities of election judges).

In 1996, before this suit was filed, the Texas Election Code required the Dallas County Commissioners Court to appoint on an annual basis presiding and alternate election

judges for each precinct. Tex. Elec. Code § 32.002(a) (repealed 1997). Although the Code required the Commissioners Court to "consider" the recommendations of the County Elections Administrator before making an appointment, the statute vested the Commissioners Court with the discretion to appoint any qualified person. Tex. Elec. Code § 32.002(d) (repealed 1997).

Between November 1, 1972, when Texas became a covered jurisdiction under the Voting Rights Act, and October 1996, when the Commissioners Court adopted the appointment plan at issue, the Commissioners Court adopted various methods for selecting election judges, without first obtaining preclearance from the Department of Justice. *See Foreman*, 990 F. Supp. at 507 (detailing the chronology of changes). For example, between 1982 and 1995, the Commissioners Court appointed election judges pursuant to a presidential election formula. This formula required the presiding judge to be a member of the party whose presidential candidate carried the precinct in the most recent presidential election. The alternate judge was appointed from the other party. In 1995, however, the Commissioners Court adopted a senatorial method for appointing election judges. This method was based on which party carried a precinct in the most recent senate race. Dallas County, Texas Order No. 95-1313 (1995) (repealed 1996) (hereinafter "1995 Order").

In September 1996, the Commissioners Court changed its appointment method again. This time, in all precincts where the Republican candidate for Senate received the most votes in the 1994 election, the person submitted or approved by the Republican party would be named the presiding election judge.[1]

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[1] The person submitted or approved by the Democratic party would be named alternate presiding election judge.

A majority of the Commissioners Court could vote, however, not to appoint the proposed judge. In all other precincts, the commissioner who represented the precinct determined whether the person submitted or approved by the Republican or Democratic party would be appointed presiding election judge. The person submitted or approved by the party whose candidate was not chosen was named the alternate election judge, subject to the veto of a majority of the Commissioners Court. Dallas County, Texas Order No. 96-1630 (1996) (repealed 1996) (hereinafter "1996 Order"). Because this new methodology gave the individual commissioners influence over the appointment of election judges in precincts where the Republican Senate candidate did not win a majority, the practical effect was more Republican and fewer Democratic presiding judges.

On October 3, 1996, the plaintiffs – black and Hispanic voters who had not been reappointed as election judges – filed suit alleging that the 1996 Order, and its appointment procedure, had not received preclearance as required by § 5 of the Voting Rights Act. The plaintiffs also filed a motion for a temporary restraining order to enjoin the defendants from implementing the 1996 Order.[2] The district court granted the motion and issued a temporary restraining order, and convened a three-judge court as required by the VRA to consider the merits.

A few days later the Commissioners Court rescinded the 1996 Order and, claiming authority from § 32.002 of the Election Code, proceeded to appoint election judges in a purely discretionary manner. The Commissioners Court, which

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[2] The plaintiffs also moved to enjoin the defendants from implementing the previous 1995 Order.

consisted of four Republicans and one Democrat, then appointed only Republicans as presiding election judges, and Democrats as alternate presiding election judges. In addition to clearing the precincts of all presiding election judges from the Democratic party, at least 54 black and 33 Hispanic election judges were not reappointed. Dallas County, Texas Order No. 96-1950 (1996) (repealed 1997) ("October Order").

The plaintiffs subsequently amended their complaint and sought declaratory and injunctive relief enjoining the Commissioners Court from implementing the October Order for failure to receive preclearance under § 5 of the VRA. The three-judge court denied the request for injunctive relief and allowed the 1996 elections to take place under the supervision of the election judges that had been appointed under the October Order. After the election was over, the three-judge court dismissed the plaintiffs' suit, holding that § 5 of the VRA did not apply to the Commissioner Court's procedures for appointing precinct election judges. Because the entire Texas Election Code had been precleared in 1985, the three-judge court reasoned that the Commissioners Court was merely exercising its discretion pursuant to the precleared Election Code.

On appeal, the Supreme Court rejected the holding of the three-judge court and found that the appointment procedures were properly covered by § 5 of the VRA. *Foreman v. Dallas County, Tex.*, 117 S. Ct. 2357, 2358 (1997) (per curiam). The Court noted, however, that the determinative question was whether the county sought to administer a procedure that was different from the one in place on November 1, 1972, the date the VRA went into effect in Texas. *Id.* at 2358-59. Because the record was silent on the procedures for appointing election judges in 1972, the Supreme Court on

June 27, 1997 vacated the three-judge court's ruling and remanded the case for further findings. *Id.* at 2359.

However, prior to the Supreme Court's decision the Texas legislature amended § 32.002 of the Texas Election Code and adopted a gubernatorial method for selecting election judges. *See* Tex. Elec. Code § 32.002 (1999). The Justice Department precleared the revised statute on September 2, 1997, and on October 7, 1997, the Commissioners Court appointed new election judges in accordance with the new method.[3] On January 8, 1998, the three-judge court dismissed the plaintiffs' § 5 preclearance claim as moot, leaving open the question of attorney's fees. On the plaintiffs' motion, a single district judge found that the plaintiffs were prevailing parties within the meaning of 42 U.S.C. § 1973*l*(e), and awarded the plaintiffs roughly $183,263 in attorney's fees. The defendants timely appealed.

II.

We review a district court's award of attorney's fees for abuse of discretion and its supporting factual findings for clear error. *Wilson v. Mayor of St. Francisville*, 135 F.3d 996, 998 (5th Cir. 1998). We review the conclusions of law underlying the award of attorney's fees *de novo*. *Marre v. United States*, 117 F.3d 297, 301 (5th Cir. 1997) (citing *Texas Food Indus. Ass'n v. United States Dept. of Agric.*, 81 F.3d 578, 580 (5th Cir. 1996)).

III.

On appeal the defendants assail the district court's

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[3] All six plaintiffs were reappointed as presiding judges.

finding that the plaintiffs qualify as prevailing parties under 42 U.S.C. § 1973*l*(e).[4] As reflected in its memorandum order, the district court based that determination on two separate grounds. The district court first found that the plaintiffs were prevailing parties because their suit was a "significant catalyst" behind the Texas legislature's decision to amend § 32.002 of the Election Code and enact a gubernatorial appointment procedure. The court also found that the plaintiffs were prevailing parties because the plaintiffs were successful in obtaining a temporary restraining order. We begin our review of those two findings with a brief look at our guiding principles.

Only "prevailing parties" may recover attorney's fees under 42 U.S.C. § 1973*l*(e).[5] What it means to "prevail" was recently clarified by the Supreme Court in *Farrar v. Hobby*, 506 U.S. 103, 109 (1992). There, the Supreme Court explained that a plaintiff prevails "when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Id.* at 111-12; *TK's Video, Inc. v. Denton County, Texas*, 24 F.3d 705, 711 (5th Cir. 1994). The Court further observed that "[n]o material alteration of the legal relationship between the parties occurs until the plaintiff

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[4] Section 1973*l*(e) provides in relevant part:

In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1973*l*(e).

[5] Because the phrase "prevailing party" connotes the same general meaning under § 1973*l*(e) and 42 U.S.C. § 1988, cases under both Acts apply the same principles when determining plaintiffs' entitlement to attorney's fees. *See Posada v. Lamb County*, 716 F.2d 1066, 1071 (5th Cir. 1983).

becomes entitled to enforce a judgment, consent decree, or settlement against the defendant." *Farrar*, 506 U.S. at 113. Thus, "the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant." *Id.* at 111. With those standards in mind, we turn to the substantive merits of this appeal.

A.

The first matter we address is the district court's finding that the plaintiffs are prevailing parties because their suit was a significant "catalyst" behind the Texas legislature's decision to amend the appointment procedures. On appeal the defendants argue that the district court's finding is incorrect because prevailing party status can no longer be based on a catalyst theory after the Supreme Court's decision in *Farrar*. The defendants further contend that even if the catalyst theory remains good law, it cannot be applied the acts of third parties and, in particular, to the acts of a general legislature.

By bringing this challenge to the district court's use of the catalyst theory, the defendants have ventured into an unsettled area of the law. Before the Supreme Court's decision in *Farrar*, the catalyst theory was routinely applied in this and other circuits. *See Heath v. Brown*, 858 F.2d 1092, 1094 (5th Cir. 1988); *Garcia v. Guerra*, 744 F.2d 1159, 1162 (5th Cir. 1984); *Williams v. Leatherbury*, 672 F.2d 549, 550-51 (5th Cir. 1982). It allowed a plaintiff to achieve prevailing party status – even in the absence of a formal victory in court – if the plaintiff's suit was a "substantial factor or a significant catalyst" in obtaining the relief sought. *See Leatherbury*, 672 F.2d at 550-51 (explaining catalyst theory).

After *Farrar*, however, the continuing validity of the

catalyst theory is in serious doubt. In *Farrar* the Supreme Court seemed to narrow the circumstances in which a party may claim prevailing party status. The Court noted that "to qualify as a prevailing party . . . [t]he plaintiff must obtain an *enforceable judgment . . . or comparable relief through a consent decree or settlement.*" *Id.* at 111 (emphasis added). The Court declared that "[o]nly under these circumstances can civil rights litigation effect 'the material alteration of the *legal relationship* of the parties' and thereby transform the plaintiff into a prevailing party." *Id.* (emphasis added). The Court added that "[n]o material alteration of the legal relationship between the parties occurs until the plaintiff becomes entitled to enforce a *judgment, consent decree, or settlement* against the defendant." *Id.* at 113 (emphasis added).

The language in *Farrar* strongly suggests that a plaintiff must obtain some merits-based relief which alters its legal standing with the defendant before it may claim prevailing party status. That, however, is seemingly at odds with the catalyst theory which allows a plaintiff to claim prevailing party status even if there is no material change in the legal relationship between the parties. *See Leatherbury*, 672 F.2d at 550 ("Success by judgment may be self-evident, but a party may still 'prevail' if its ends are accomplished as a result of the litigation even without formal judicial recognition"). This has led at least one court to conclude that *Farrar* has swept the catalyst theory into the judicial trash heap. *See S-1 & S-2 v. State Bd. of Educ.*, 21 F.3d 49, 51 (4th Cir.) (en banc), *cert. denied*, 513 U.S. 876 (1994) (expressly overruling the "catalyst" theory and stating that a plaintiff may only qualify as a "prevailing party" by virtue of "having obtained an enforceable judgment, consent decree, or settlement giving some of the legal relief sought"). Other courts have disagreed, finding that their respective versions of the catalyst theory

remain viable. *See, e.g., Ellis v. University of Kansas Med. Ctr.*, 163 F.3d 1186 (10th Cir. 1998); *Brown v. Local 58, Int'l Bd. of Elec. Workers, AFL-CIO*, 76 F.3d 762 (6th Cir. 1996); *Marbley v. Bane*, 57 F.3d 224 (2d Cir. 1995); *Kilgour v. City of Pasadena*, 53 F.3d 1007 (9th Cir. 1995); *Zinn v. Shalala*, 35 F.3d 273 (7th Cir. 1994).

This Court has never fully explored the impact of *Farrar* on the catalyst theory. There have been a few cases after *Farrar* that have continued to apply the catalyst rule. *See, e.g., Watkins v. Fordice*, 7 F.3d 453, 456 (5th Cir. 1993) (acknowledging the catalyst theory without discussing the potential conflict with *Farrar*); *Pembroke v. Wood County*, 981 F.2d 225, 231 n. 27 (5th Cir. 1993) (distinguishing *Farrar* and seeming to limit its holding to suits seeking money damages, but not discussing potential conflict between the catalyst theory and *Farrar*); *Milton v. Shalala*, 17 F.3d 812, 814-15 (5th Cir. 1994) (acknowledging the catalyst theory without discussing potential conflict with *Farrar*). And in one opinion we acknowledged the question and observed that the catalyst theory "might" still be good law. *Craig v. Gregg County*, 988 F.2d 18, 20-21 (5th Cir. 1993). But we have never addressed the issue directly. Though the defendants now urge us to engage in that close debate, we decline the invitation. Assuming, without deciding, that the catalyst theory still applies in this Circuit, the facts of this case do not support a finding that the plaintiffs were prevailing parties under 42 U.S.C. § 1973*l*(e).

We have held that under the catalyst theory a plaintiff may obtain attorney's fees as a prevailing party only if it establishes (1) that the relief sought by plaintiff was in fact obtained, and (2) that the suit itself caused the defendant to alter its conduct. *Pembroke*, 981 F.2d at 230. In order to prove

the requisite causation, the lawsuit must have been a "a substantial factor or a significant catalyst" in motivating the defendants to alter their behavior. *Robinson v. Kimbrough*, 652 F.2d 458, 466 (5th Cir. 1981). Here, the defendants assert that the plaintiffs do not qualify as prevailing parties because they failed to obtain the relief sought in their suit. The defendants also contend that there is insufficient evidence that the plaintiffs' action was a substantial factor in the Texas legislature's decision to adopt the gubernatorial appointment procedure. We agree on each count.

The plaintiffs brought suit under § 5 of the VRA. The gravamen of their complaint is that the defendants adopted the 1996 appointment procedure without preclearing it with the Department of Justice, as required by the statute. For relief the plaintiffs requested: (1) a declaration from the district court that the 1996 Order was legally unenforceable; (2) a temporary and permanent injunction against the defendants' use of any procedure that had not been precleared; (3) a declaration from the district court ordering the defendants to preclear the procedure; and (4) a declaration from the district court ordering that the 1996 election be conducted using a legally enforceable procedure, or, alternatively, the procedure used from 1982 to 1995.

From a cursory reading of the plaintiffs' complaint it is evident that the plaintiffs filed this action solely to enforce § 5's preclearance procedures. It is equally apparent that all of the plaintiffs' requested relief flowed from the rights that accrued under § 5 of the VRA. Thus, when the Texas legislature adopted an entirely different appointment method, mooting the litigation, the plaintiffs went home empty handed. They received none of the substantive relief for which they originally filed suit.

The plaintiffs, however, would have us believe that they successfully obtained relief in the form of the newly-enacted gubernatorial method. They would point to the fact that under that new method they were reappointed to their old positions. Though carrying some initial appeal, their argument fails under close scrutiny.

The plaintiffs' complaint is filed under the narrow confines of § 5 of the VRA, with the stated intent of forcing the defendants to preclear the 1996 appointment procedure. It may be true that the plaintiffs filed this action with the goal of pressuring the defendants into adopting a different procedure. But hidden motives are not the stuff on which attorney's fees are based. A defendant cannot be asked to pay attorney's fees for relief which was never demanded, or even made clear, in the plaintiff's complaint. Similarly, even under the catalyst theory it will be a rare case indeed where a defendant is made to pay attorney's fees for relief that was secured from an independent third-party who was never a party to the lawsuit.[6] We conclude that the district court clearly erred in finding that the plaintiffs were successful in obtaining the relief sought by filing this action.

Likewise, even if we assume that the plaintiffs did obtain some relief, there is insufficient evidence of a causal connection between the plaintiffs' individual suit and the Texas legislature's decision to revamp the appointment procedure. As evidenced by its name, the catalyst theory requires that a plaintiff prove that the suit itself was a catalyst for relief. That is, the plaintiff must prove that the plaintiff's suit was a "substantial factor" in achieving the relief sought. *Robinson*,

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[6] We have been able to find no Fifth Circuit case which applies the catalyst theory under such circumstances.

652 F.2d at 466. Critically, a plaintiff does not satisfy that standard with evidence of a causal connection in the most basic sense. Instead, the plaintiff must prove the lawsuit itself, as a discrete event, had a significant and identifiable influence on the attainment of relief. Considering that the legislative process is fraught with compromises, competing concerns, and unspoken motives, a plaintiff who attempts to prove that his individual suit was the catalyst behind the passage of general legislation faces a formidable task. *See Milton v. Shalala*, 17 F.3d at 815 ("The mere possibility that Congress acted because of an individual claimant's suit (or reacted to a large number of similar suits) is too speculative in our view considering the many influences upon members of Congress in casting their votes. We agree with the cases that have refused to credit the change in law to a claimant's individual law suit and found the nexus between Congress's action and the law suit too attenuated.")

In this case, the district court found the necessary level of causation based solely on the affidavits of three Texas legislators filed after the new appointment method was adopted and after the suit was dismissed. In those affidavits the legislators essentially stated that the Texas legislature decided to enact the new procedure as a result of the plaintiffs' suit. The district court's exclusive reliance on those three affidavits was clearly erroneous.

No one legislator, or even a group of three legislators, has sufficient personal knowledge to declare the overall intent of the Texas legislature. *See Bread Political Action Comm. v. Federal Elec. Comm.*, 455 U.S. 577, 582 n. 3 (1982) (expressly refusing to give probative weight to after-the-fact affidavit of amendment sponsor regarding legislative intent); *Milton*, 17 F.3d at 815. For that we rely on the official legislative record,

which is itself often insufficient, unhelpful or confusing. In this case, three post hoc, after-the-fact, affidavits do not, standing alone, prove that the plaintiffs' suit was a substantial factor in the legislature's decision. They may show that the plaintiffs' lawsuit was a factor, to be sure. But they in no way show that it was a "substantial factor." We are strengthened in that conclusion by the fact that the plaintiffs have pointed to no other evidence in the legislative record which affirmatively shows that the Texas legislature enacted the gubernatorial method in response to the plaintiffs' suit. Moreover, we find it significant that the Texas legislature began the process of amending the appointment method well before the plaintiffs initiated this action.[7]

Thus, even were we to find that the plaintiffs received the relief they sought, there is insufficient evidence that the plaintiffs' suit caused the Texas legislature to amend § 32.002 of the Election Code. We find that the district court committed clear error in finding that the plaintiffs' suit was the catalyst behind that legislative decision. This leaves us with the last remaining issue in this appeal, whether the district court erred

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[7] The defendants correctly point out that an almost identical version of the bill that eventually became revised § 32.002 was introduced in the 1995 legislative session. *Compare Tex.* H.B. 2241, 74th Leg., R.S. (1995), *with* Tex. H.B. 331, 75th Leg., R.S. (1997) (introduced version), *and* Tex. Elec.Code § 32.002 (1999). The 1995 bill passed the Texas House as part of an omnibus election bill, but never passed the Senate. Then, a nearly identical bill was filed in the 1997 session. Tex. H.B. 331, 75th Leg., R.S. (1997) (introduced version). Therefore, the statutory change that the plaintiffs claim to have catalyzed was in fact being considered by the Texas legislature well before the plaintiffs' suit was filed. We note, additionally, that the relief sought by the plaintiffs' suit, i.e., preclearance by the Department of Justice of a change in voting procedures, is entirely separate and distinct from the change contemplated by the legislative acts, i.e., a substantive change in the procedure for selecting precinct judges.

in finding that the plaintiffs acquired prevailing party status by seeking and receiving a temporary restraining order.

B.

In its written order the district court held that "the plaintiffs did prevail with respect to their request for a temporary restraining order to enjoin the September 3, 1996, order." That, however, was the total extent of the district court's reasoning. On appeal the defendants assert that a temporary restraining order does not make a plaintiff a prevailing party. The defendants assert that it is merely a transitory order that has no affect on the merits of the litigation. We agree.

Farrar is clear. To achieve prevailing party status there must be "actual relief on the merits" which "materially alters the legal relationship between the parties." *Farrar*, 506 U.S. at 111, 113 S. Ct. 566. A temporary restraining order is not merits-based relief. Nor is it a final remedy. A temporary restraining order is a "stay put," equitable remedy that has as its essential purpose the preservation of the status quo while the merits of the cause are explored through litigation. As such, a temporary restraining order cannot constitute the type merit-based relief that affords a plaintiff prevailing party status. The district court committed clear error in reaching a contrary conclusion.

IV.

Although today we do not decide whether the catalyst theory survives *Farrar* in this Circuit, we hold that even under the catalyst theory the district court clearly erred in finding that the plaintiffs were prevailing parties. Accordingly, as the

district court abused its discretion in granting attorney's fees under 42 U.S.C. § 1973*l*(e), we reverse and render judgment that plaintiffs take no attorney's fees.

CARL E. STEWART, Circuit Judge, dissenting:

The majority has held that the district court clearly erred in finding that the plaintiffs were prevailing parties, and that therefore the district court abused its discretion in awarding the plaintiffs attorneys' fees under 42 U.S.C. § 1973*l*(e). While I agree that the catalyst theory is the appropriate basis upon which to decide this case, I cannot agree with the conclusion reached by the majority. For the following reasons I respectfully dissent.

This court reviews the district court's award of attorneys' fees for abuse of discretion, and the underlying factual findings are reviewed for clear error. *See League of United Latin American Citizens No. 4552 (LULAC) v. Roscoe Independent School District*, 119 F.3d 1228, 1232 (5th Cir. 1997). This court has clearly emphasized that a district court has broad discretion in determining the appropriate award of attorneys' fees. *See Associated Builders and Contractors of Louisiana Inc. v. Orleans Parish School Board*, 919 F.2d 374, 379 (5th Cir. 1990); *LULAC*, 119 F.3d at 1232. The determination of attorneys' fees is an "intensely factual" inquiry, and thus the district court's broad discretion in this area is appropriate because of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters. *Associated Builders*, 919 F.2d at 379 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)); *see also Posada v. Lamb County, Tex.*, 716 F.2d 1066, 1072 (5th Cir. 1983). Viewing the facts of the present case from this deferential standard of review, and considering the broad discretion that should be accorded the district court in this area I cannot agree with the majority that the district court clearly erred in its factual findings, and abused its discretion in awarding

attorneys' fees to the plaintiffs.

To establish prevailing party status under the catalyst theory,[1] the plaintiffs must demonstrate (1) that the relief they sought was in fact obtained, and (2) that the suit itself caused the defendant to alter its conduct. *See Pembroke v. Wood County*, 981 F.2d 225, 230 (5th Cir. 1993). The majority opines that the plaintiffs filed this action solely to enforce the preclearance procedures mandated by § 5 of the Voting Rights Act, and that when the Texas legislature adopted a method of appointment that was different from the one specifically advocated by either the plaintiffs or defendants, the plaintiffs "went home empty handed". The record, however, does not support the majority's conclusion.

The plaintiffs, a group of African-American and Hispanic voters of Dallas County who had served as election judges, brought this complaint after the Commissioners Court of Dallas County ("defendants") sought to make changes in the appointment procedures for election judges. These changes which were adopted September 3, 1996 ("1996 Order") meant that the plaintiffs would lose their positions as election judges. The plaintiffs' original complaint, filed on October 3, 1996, alleged that the defendants changed the procedures for

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[1] In deciding this case the majority applies the catalyst theory, but states that "the continuing validity of the catalyst theory is in serious doubt" due to the Supreme Court's decision in *Farrar v. Hobby*, 506 U.S. 103, 109 (1992). The majority declines to decide whether the catalyst theory still applies in this Circuit, however, it is critical to acknowledge that post-*Farrar* this Circuit and the majority of other circuits have continued to apply the catalyst theory. *See, e.g., Pembroke v. Wood County*, 981 F.2d 225, 231 n.27 (5th Cir. 1993); *Craig v. Gregg County*, 988 F.2d 18 (5th Cir. 1993); *Ellis v. University of Kansas Medical Center*, 163 F.3d 1186 (10th Cir. 1999); *Zinn v. Shalala*, 35 F.3d 273 (7th Cir. 1994).

appointing election judges without the preclearance of the Department of Justice as required under § 5 of the Voting Rights Act. The plaintiffs sought declaratory and injunctive relief to block the implementation of any procedure that was not precleared, including a specific declaration that the 1996 Order was not legally enforceable. The plaintiffs were immediately successful on two fronts. First, the district court granted the plaintiffs' request for a temporary restraining order which blocked the defendants from implementing the 1996 Order. Furthermore, a few days after the district court issued the temporary restraining order the defendants rescinded the 1996 Order, and implemented a different procedure which granted the Commissioners Court of Dallas County discretion in selecting the election judges ("October Order"). As a result of the defendants response to the temporary restraining order the plaintiffs were successful in one of their goals for the litigation which was to insure that the 1996 Order was not implemented. While the plaintiffs did not achieve this goal through a declaration from the district court that the 1996 Order was legally unenforceable, it is clear from the record that the defendants abandoned the 1996 Order in response to the litigation. The defendants abandoned the 1996 Order only five days after the temporary restraining order was issued that resulted in a short term cessation of the implementation of the 1996 Order. This court has recognized that when a lawsuit motivates a defendant to take voluntary action to alleviate the conditions outlined in the complaint, the plaintiff can be considered a prevailing party although they received no judicial decree. *See Pembroke*, 981 F.2d at 230.

The second goal of the plaintiffs' complaint was to have the procedures for appointing election judges precleared by the Department of Justice as prescribed in § 5 of the Voting Rights Act. After the defendants abandoned the 1996 Order and

replaced it with a discretionary method of selecting election judges, the plaintiffs amended their complaint seeking § 5 preclearance of this procedure. The defendants steadfastly maintained throughout this litigation that the procedures to select election judges were not subject to preclearance under § 5 of the Voting Rights Act because these were discretionary activities as provided for in the Texas Election Code, which was precleared in 1985. The three judge district court agreed with the defendants' theory and refused the plaintiffs' application for a permanent injunction on the grounds that the defendants' procedures were a proper exercise of discretion granted by the state election statute.

Despite this setback, the plaintiffs were eventually successful in receiving a judicial declaration that the procedures for appointing election judges are subject to the requirements of § 5 of the Voting Rights Act. The Supreme Court, in *Foreman v. Dallas County*, 521 U.S. 979, 980 (1997) held that the actions of the Commissioners Court of Dallas County in selecting election judges may require preclearance because the County's exercise of its discretion under the Texas Election Code does not shield its actions from § 5.[2] *Foreman v. Dallas County*, 521 U.S. 979, 980 (1979). This Supreme Court decision meant that the defendants would no longer be able to implement any procedure for appointing election judges without meeting the requirements of § 5 of the Voting Rights Act, including preclearance if the defendants sought to implement procedures that had not previously been precleared.

The Supreme Court remanded the case for further

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[2] The Supreme Court did not make a final determination whether preclearance was required for the October Order because the record did not contain sufficient information. *See Foreman*, 521 U.S. at 981.

proceedings, but while the case was on appeal to the Supreme Court the Texas Legislature amended § 32.002 of the Texas Election Code to provide that all precinct election judges would be chosen based on the results from the gubernatorial elections ("gubernatorial method"). Texas submitted the gubernatorial method for Preclearance from the Department of Justice which was granted by the Attorney General in September 1997. Thus, the October 1996 Orders which were the subject of this litigation were superceded by the precleared gubernatorial method of selection adopted by the Texas legislature. As a result of the legislation the plaintiffs were all reappointed as election judges, and the defendants were forced to implement a system of selection which was precleared under § 5 of the Voting Rights Act.

The actions of the Texas legislature helped provide the plaintiffs with one aspect of the relief they sought by forcing the defendants to adopt a precleared method of appointing election judges. Therefore to be prevailing parties under the catalyst theory the plaintiffs must demonstrate that their suit was a significant contributing factor in the Texas legislature's actions. *See Posada*, 716 F.2d at 1072. The lawsuit need not be the sole reason for the legislature's action, but the plaintiffs' actions must have made an important contribution to the improvements which were achieved. *Id.*

The majority finds that the district court clearly erred in finding that there was a causal link between the plaintiffs' lawsuit and the actions of the Texas legislature. Specifically, the majority holds that the district court clearly erred in its reliance on the affidavits of three Texas legislators to establish this causal link. I disagree with the majority that the district court clearly erred in relying on these affidavits.

The majority cites *Bread Political Action Committee v. Federal Election Committee*, 455 U.S. 577, 582 n.3(1982) for the proposition that no single legislator, or even a group of three legislators has sufficient personal knowledge to declare the overall intent of the legislature. In *Bread Political Action Committee*, the Supreme Court interpreted the language of the Federal Election Campaign Act of 1971("FECA"). The plaintiffs argued that to interpret the meaning of FECA the Court should not rely solely on the language of the statute but instead should expansively construe the statute. *See Bread Political Action Comm.*, 455 U.S. at 581, 102 S. Ct. 1235. As part of their evidence to convince the Court to adopt this expansive construction of FECA the plaintiffs offered the affidavit of the senator who sponsored the amendment as proof that the legislature intended for the bill to be liberally construed by the courts. The senator's opinion contradicted the language of the bill itself, and the Court concluded that the senator's statements should be given no probative weight regarding the legislative intent. *See Bread*, 455 U.S. at 582 n. 3, 102 S. Ct. 1235.

The present case is clearly distinguishable from *Bread* because in this case the district court did not rely on the affidavits of the Texas legislators to interpret the meaning of the Texas Election Code, or the legislative intent in regards to how the statute should be applied. Instead the plaintiffs offered these affidavits to demonstrate that their lawsuit was a catalyst in the passage of the legislation, including motivating the introduction of the legislation. The question in *Bread* was legislative intent, and the question in this case is legislative motive. In determining legislative motive it is helpful to examine different factors.

It is logical that in seeking to interpret the meaning of

a statute that courts should reject the post-hoc opinions of legislators as controlling evidence because the courts already have adequate information that can be gleaned from the language of the statute itself or the official legislative history. *See Bread*, 455 U.S. at 580, 102 S. Ct. 1235 (stating that analysis of the issue of statutory construction must begin with the language of the statute itself). However, what will often not be found in the language of a statute or the official legislative history is the motivation for introducing a bill, or each member of the legislatures reasons for supporting the legislation. The majority acknowledges that legislative history is often "insufficient, unhelpful or confusing." Absent a holding that a party can never conclusively establish that a lawsuit is a catalyst for legislation because of the impreciseness of the proof available, we must acknowledge some reasonable method for parties to prove that their actions were a catalyst in the passage of legislation. One reasonable method of establishing that a lawsuit was a significant factor in the introduction and passage of legislation is to determine the legislators' motivation by considering the legislators' statements about their motivation.

The plaintiffs received affidavits from three Texas legislators, Senator Royce West ("Senator West"), Representative Debra Danburg ("Representative Danburg"), and Representative Terri Hodge ("Representative Hodge"). Senator West stated that he introduced Senate Bill 130, which advocated the gubernatorial method of appointing election judges after hearing about the defendants' 1996 Order which would have altered the selection procedures. Senator West further revealed that he attended a public meeting to voice his concerns to the defendants about the change of procedures in choosing presiding election judges. Finally, Senator West stated that he was involved in discussions with the plaintiffs'

counsel about pursuing the present lawsuit, and that the present lawsuit served as a catalyst for his introduction of the legislation in the Texas Senate. The majority states that the legislators do not have personal knowledge of the motivations of the legislature, however, as the sponsor of the Senate bill Senator West certainly has personal knowledge of what caused him to introduce the legislation which eventually was passed into law by the legislature.

Representative Danburg, who serves as the chair of the Texas House of Representatives Committee on Elections, introduced House Bill 331 which was similar to Senator West's Senate bill in that it also advocated the use of the gubernatorial method for appointing election judges. Representative Danburg stated that when she introduced House Bill 331 she was aware of the lawsuit and it served as a catalyst for her to introduce the bill, and that the lawsuit was a causal factor in the action taken by the legislature. It is difficult to dispute that a legislator knows their own motivations for introducing bill and what influenced them to take that action.

Representative Hodge who is a member of the Dallas County delegation to the Texas House of Representatives declared that she became aware of this lawsuit in the Fall of 1996, this lawsuit was the subject of conversation among her colleagues in the legislature, and that the lawsuit was a catalyst in the bringing about the legislative action.

It is important to note that the defendants offered no affidavits or evidence that contradicted the sworn testimony of these three Texas legislators who all clearly stated that the present lawsuit was a significant factor in the introduction and passage of the legislation which forced the defendants to adopt the precleared gubernatorial method for appointing election

judges. The only support the defendants offered to bolster their argument that the lawsuit was not a catalyst for the legislation was a copy of a 1995 house bill with almost identical language to the language used in Senate Bill 130 and House Bill 331. The majority determines that the existence of a bill which proposed the gubernatorial method of selection before the lawsuit was filed demonstrates that the 1997 legislation was already under consideration by the Texas legislature, and therefore the 1997 legislation could not have been catalyzed by the plaintiffs' lawsuit. However, the 1995 bill which passed in the Texas House was not adopted by the Texas Senate. Therefore, a bill proposing the gubernatorial method of appointment was not under consideration by the legislature when the plaintiffs filed their lawsuit in the fall of 1996. Moreover, there is no support in the case law for the notion that the preexistence of a legislative concept is a per se bar to an evidentiary determination of catalytic effect. Senator West and Representative Danburg who introduced the 1997 bills in the Senate and Houses were unequivocal in their testimony that it was the plaintiffs' lawsuit that was the catalyst for their introduction of the bill. The majority does not appear to question the truthfulness or veracity of Senator West or Representative Danburg's testimony. Therefore, absent the presence of contradicting affidavits or other substantive evidence the defendant's alternative explanation of the 1995 bill as a motivation for the legislator's introduction of the 1997 bill was correctly found by the district court to be unavailing.[3]

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[3] The majority states that their conclusion that the three Texas legislators' statements are not sufficient evidence is strengthened by the fact that plaintiffs' point to no other evidence in the legislative record which affirmatively shows that the Texas legislature acted in response to the plaintiffs' lawsuit. However, there was one mention of the lawsuit in the legislative record. Steve McDonald, an employee of the Texas Democratic party, submitted an affidavit to the district court which stated that he

Finally, the majority cites *Milton v. Shalala*, 17 F.3d 812 (5th Cir. 1994) for their proposition that it is difficult to establish a causal connection between the legislature's actions and an individual suit. In *Milton*, this court rejected a plaintiff's claim for attorneys' fees where the plaintiff was one of the thousands of litigants whose lawsuits may have helped spur the enactment of a social security disability reform act. The panel stated that the mere possibility that the United States Congress acted because of an individual claimant's suit is too speculative to credit a change in the federal law to a claimant's individual lawsuit. *Milton*, 17 F.3d at 815. I do not quarrel with the holding in *Milton*. Unlike *Milton*, the present plaintiffs' lawsuit was not simply one of thousands of lawsuits that all sought redress for the same complaint making it difficult to establish a nexus between any one of the many lawsuits and the congressional action. The record does not indicate that there were any other lawsuits pending to address appointment procedures for election judges in Texas. Unlike *Milton*, the plaintiffs' action in this case was unique in its challenge, and is specifically credited by the sponsoring legislators as a catalyst in the introduction and passage of the legislation. Furthermore, there is no indication that the plaintiff in *Milton* offered any evidence to establish a causal link between his individual lawsuit and the congressional action taken. In contrast, these plaintiffs have offered the uncontradicted, sworn declarations of three Texas legislators who state that the present lawsuit was a catalyst in the passage of the 1997 legislation.

For the above reasons I disagree with the majority that

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testified about the 1997 bill in the Texas Senate, and during his testimony specifically cited this litigation as a reason for the Senate to adopt the bill. No counter affidavit is found in the record.

the district court clearly erred in finding that the plaintiffs' lawsuit was not a substantial factor in the passage of legislation which forced the defendants to adopt the precleared gubernatorial method of appointing election judges. The plaintiffs met the goals of their lawsuit in that the lawsuit caused the defendants to abandon the 1996 order. The plaintiffs also received a favorable decision from the Supreme Court that the appointment procedures for election judges are subject to § 5 of the Voting Rights Act. Finally, the plaintiffs were reappointed to their offices as election judges. This occurred as a result of the 1997 Texas legislation which forced the defendants to modify their procedures. According to all the substantive evidence presented to the district court this new legislation was catalyzed by the plaintiffs' lawsuit. The factual determinations of the district court are amply supported by the record. Therefore, the district court did not abuse its discretion in awarding attorneys fees to the plaintiffs under 42 U.S.C. § 1973*l*(e). Accordingly, I respectfully dissent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

B.C. FOREMAN, et al.,	§	
Plaintiffs,	§	Civil Action No.
	§	3:96-CV-2764-D
vs.	§	
DALLAS COUNTY, TEXAS,	§	
et al.,	§	
Defendants.	§	

TEMPORARY RESTRAINING ORDER
(Filed Oct. 3, 1996)

In this action brought pursuant to § § 5 and 12(d) of the Voting Rights Act of 1965, plaintiffs have applied for a temporary restraining order ("TRO") to prevent defendants from implementing two orders of the Dallas County Commissioners Court that effect changes in the procedures for selection and appointment of precinct election judges and alternates in Dallas County, Texas. Plaintiffs have also applied for a preliminary injunction, and they request that a three-judge court be convened to consider their application.

A single judge of a three-judge court "may grant a temporary restraining order on a specific finding, based on evidence submitted, that specified irreparable damage will result if the order is not granted." 28 U.S.C. § 2284(b)(3).

Having considered plaintiffs' evidentiary submissions

and arguments of counsel in chambers, the court finds and concludes that plaintiffs have made the necessary preliminary showing to obtain part of the TRO relief for which they have applied. Specifically, they have demonstrated a substantial likelihood that implementation of Dallas county commissioners court Order No. 95-1313 and/or Order No. 96-1630 for the November 5, 1996 election will violate § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, because the orders effect changes in voting practices or procedures that have not received pre-clearance from the Attorney General of the United States. Plaintiffs have also demonstrated irreparable damage from defendants' maintaining and effecting election procedures that violate federal law. They have also shown that the harm to them outweighs the harm to defendants, and that entering a TRO will not disserve the public interest.

Accordingly, pending further order of the undersigned or of the three-judge court, or, if longer, for a period of 10 days, defendants, their officers, agents, servants, employees, and attorneys, and all persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise, are temporarily restrained from implementing Dallas County Commissioners Court Order No. 95-1313 (adopted August 8, 1995) and Order No. 96-1630 (adopted September 3, 1996) for the November 5, 1996 election. This restraining order also applies to Dallas County Commissioners Court Order No. 96-1632 (adopted September 3, 1996) to the extent necessary to effect the restraint hereby imposed on implementation of Order No. 96-1630.

The three-judge court shall by separate order direct the manner in which plaintiffs' application for a preliminary injunction shall be heard and considered.

Nothing in this order precludes defendants from rescinding the orders hereby restrained or from taking such other actions as may be necessary in order for necessary pre-clearance to be obtained.

SO ORDERED.

October 3, 1996 at 4:23 p.m.

/s/ Sidney A. Fitzwater
SIDNEY A. FITZWATER
UNITED STATES DISTRICT JUDGE

APPENDIX C

B.C. FOREMAN, et al.
v.
DALLAS COUNTY, TEXAS, et al. (Two Cases)

Nos. 96-987, 96-1389.

Supreme Court of the United States

June 27, 1997.

PER CURIAM.

Texas by statute authorizes counties to appoint election judges, one for each precinct, who supervise voting at the polls on election days. In 1983 and several times thereafter, Dallas County changed its procedures for selecting these officials. Each of the new methods used party-affiliation formulas of one sort or another. After the most recent change in 1996, appellants sued the County and others in the United States District Court, claiming that § 5 of the Voting Rights Act, 79 Stat. 439, as amended, 42 U.S.C. § 1973c, required that the changes be precleared.

A three-judge court held that preclearance was not required because the County was simply exercising, under the state statute, its "discretion to adjust [the procedure for appointing election judges] according to party power." App. to Juris. Statement 4a. The court apparently concluded that this "discretionary" use of political power meant that the various methods for selecting election judges were not covered changes under § 5. The court also concluded that the Justice Department's preclearance of a 1985 submission from the State – the recodification of its entire election code – operated to

preclear the County's use of partisan considerations in selecting election judges. The court denied injunctive relief, and later dismissed appellant's complaint pursuant to Fed. Rule Civ. Proc. 12(b)(6). Appellants have brought both of these rulings here.

We believe that the decision of the District Court is inconsistent with our precedents. First, in *NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 178 (1985), we held that even "an administrative effort to comply with a statute that had already received preclearance" may require separate preclearance, because § 5 "reaches informal as well as formal changes." Thus, the fact that the County here was exercising its "discretion" pursuant to a state statute does not shield its actions from § 5. The question is simply whether the County, by its actions, whether taken pursuant to a statute or not, "enact[ed] or [sought] to administer any . . . standard, practice, or procedure with respect to voting different from" the one in place on November 1, 1972. § 5. The fact that the County's new procedures used political party affiliation as the selection criteria does not mean that the methods were exempt from preclearance.

Second, the State's 1985 submission (the recodification and a 30-page summary of changes to the old law) indicated that the only change being made to the statute concerning election judges was a change to "the beginning date and duration of [their] appointment." Thus, neither the recodified statute nor the State's explanations said anything about the use of specific, partisan-affiliation methods for selecting election judges. This submission was clearly insufficient under our precedents to put the Justice Department on notice that the State was seeking preclearance of the use of partisan affiliations in selecting election judges. *See, e.g., Young v. Fordice*, 520

U.S. 273, ---- - ----, 117 S. Ct. 1228, 1236-1237 (1997); *Lopez v. Monterey Cty.*, 519 U.S. 9, ---- - ----, 117 S. Ct. 340, 344-345 (1996); *Clark v. Roemer*, 500 U.S. 646, 658-659 (1991).

Because the parties agree that the record is silent as to the procedure used by Dallas County for appointing election judges as of November 1, 1972, the date on which Texas became a covered jurisdiction under the Voting Rights Act, we cannot make a final determination here as to whether preclearance is in fact required. We therefore vacate the judgment of the District Court in No. 96-1389, dismiss the appeal from the District Court's interlocutory judgment in No. 96-987, see *Shaffer v. Carter*, 252 U.S. 37, 44 (1920), and remand for further proceedings.

It is so ordered.

APPENDIX D

B.C. FOREMAN, et al., Plaintiffs,
v.
DALLAS COUNTY, Texas, et al., Defendants.

No. CIV. A. 3:96-CV-2764.

United States District Court, N.D. Texas.

June 25, 1998.
Entered on Docket, June 26, 1998,
Pursuant to Fed. R. Civ. P. 58, 79a.

FITZWATER, District Judge.

Plaintiffs' motion for an award of attorney's fees, expenses, and costs in this Voting Rights Act suit presents the principal question whether they are prevailing parties who are entitled to recover such relief. Concluding that plaintiffs have established by a preponderance of the evidence that they prevailed in obtaining a temporary restraining order, and that their lawsuit otherwise was a substantial factor or a significant catalyst in causing the Texas Legislature to enact TEX. ELECTION CODE ANN. § 32.002(c) (West Supp.1998), which in turn required defendant Dallas County, Texas ("Dallas County") to alter its method for appointing election judges, the court grants the motion.

I

The relevant background facts and procedural history of this case are set out in the opinion of the three-judge court and need not be repeated at length. *See Foreman v. Dallas County, Tex.*, 990 F. Supp. 505, 506-509 (N.D. Tex.1998)

(three-judge court). The court will confine its discussion of the facts and procedural history to those that bear on the attorney's fees issue.[1]

Plaintiffs contend they are entitled, pursuant to 42 U.S.C. § 1973*l*(e), 42 U.S.C. § 1988, and 28 U.S.C. § 1920 to recover the sum of $183,263.95 in attorney's fees and expenses, together with costs and any additional sums incurred in litigating this case in this court. Defendants oppose the motion on various grounds.

Plaintiffs brought this suit to enjoin Dallas County and the individual defendants from implementing changes that the Dallas County Commissioners Court had adopted in the method for appointing presiding and alternate presiding judges for county election precincts for the 1996-97 term. The version of § 32.002 of the Texas Election Code in effect in 1996 required that the Commissioners Court annually appoint presiding and alternate presiding election judges for each regular county election precinct. TEX. ELECTION CODE ANN. § 32.002(a) (repealed 1997). The Code mandated that the Commissioners Court consider the recommendations of the County Elections Administrator before making an appointment, *id.* § 32.002(d) (repealed 1997), but vested the Commissioners Court with the discretion to appoint any qualified person. From 1982 until 1995 Dallas County used a Presidential election formula. In 1995 the Commissioners Court adopted a Senatorial method to be followed during the 1995- 97 period. DALLAS COUNTY, TEXAS ORDER NO. 95-1313 (1995) (repealed 1996).

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[1] The motion for attorney's fees, expenses, and costs is to be decided as a single judge matter. *See id.* at 508 n.8.

In 1996 the Commissioners Court initiated the first of a series of orders that culminated in the present litigation. On September 3, 1996 it superseded the 1995 order by adopting the following appointment procedures for the 1995-1997 period: (1) In all voting precincts in which the Republican candidate for United States Senator received the most votes in the 1994 general election, the person submitted or approved by the Republican party would be named presiding election judge, and the person submitted or approved by the Democratic party would be named alternate presiding election judge, provided, however, that a majority of the Commissioners Court could choose not to appoint any individual. (2) In all other precincts, the Commissioner who represented the precinct would determine whether the person suggested or approved by the Republican or Democratic party would be the presiding election judge. The person named or approved by the party whose preference was not chosen to be presiding election judge would be named alternate presiding election judge, provided, however, that a majority of the Commissioners Court could choose not to appoint any individual. DALLAS COUNTY, TEXAS ORDER NO. 96-1630 (1996) (repealed 1996).

After the Commissioners Court adopted this new method, plaintiffs filed this suit on October 3, 1996, seeking to block implementation of the order on the ground that the changes in the method of appointing election judges had not received § 5 preclearance. This court entered a temporary restraining order the same day,[2] and on October 8, 1996 the Commissioners Court rescinded its September order and implemented a procedure that followed § 32.002 of the Election Code, which had been precleared in 1985. DALLAS

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[2] The undersigned issued the temporary restraining order as a single judge matter.

COUNTY, TEXAS ORDER NO. 96-1950 (1996) (repealed 1997). The Commissioners Court received and considered the recommendations of the County Elections Administrator. It appointed Republican party recommendees as presiding election judges, and Democratic party recommendees as alternate presiding election judges, to hold special and general elections for the term beginning August 1, 1996 and ending July 31, 1997.

Plaintiffs responded to the new order by amending their complaint to allege that the October 1996 method violated § 5. They applied for a temporary restraining order and a preliminary injunction to preclude defendants from implementing the order, contending the necessary preclearance had not been obtained. The three-judge court denied the application. The Supreme Court denied plaintiffs' request to stay the order pending appeal. *Foreman v. Dallas County, Tex.*, --- U.S. ----, 117 S. Ct. 378 (1996). The general elections in Dallas County were then conducted under the direction of presiding judges and alternate presiding judges selected under the method adopted on October 8, 1996.

The three-judge court later dismissed plaintiffs' suit on the merits pursuant to Fed. R. Civ. P. 12(b)(6). Plaintiffs appealed the judgment and the Supreme Court vacated and remanded for further proceedings. *Foreman v. Dallas County, Tex.*, --- U.S. ----, 117 S. Ct. 2357, 2359 (1997) (per curiam). The Court held that the fact that Dallas County "was exercising its 'discretion' pursuant to a state statute [did] not shield its actions from § 5." *Id.* at ----, 117 S. Ct. at 2358. Instead, the controlling question was whether the County by its actions enacted or sought to administer any standard, practice, or procedure with respect to voting that was different from the one in place on November 1, 1972. *Id.* The Court also rejected the

holding of the three-judge court that the 1985 preclearance of the Election Code was sufficient to satisfy § 5. *Id.* Because the record was silent concerning the procedure used on November 1, 1972 for approving election judges, the Court held that "we cannot make a final determination here as to whether preclearance is in fact required." *Id.* at ----, 117 S. Ct. at 2358-59. The Court accordingly vacated the judgment of the three-judge court and remanded for further proceedings. *Id.* at ----, 117 S. Ct. at 2359.

On May 28, 1997, prior to the Supreme Court's remand, the Texas Legislature amended § 32.002. Effective September 1, 1997, revised § 32.002(c) adopts a Gubernatorial method. The Attorney General precleared the revised version of § 32.002(c) on September 2, 1997. On October 7, 1997 the Commissioners Court appointed new presiding judges and alternate presiding judges according to the Gubernatorial method. All six plaintiffs were appointed presiding judges.

Plaintiffs now maintain that they were prevailing parties in this case and/or that their lawsuit was a substantial factor or significant catalyst in bringing about a change in the method for selecting presiding election judges in Dallas County.[3]

II

The court first considers whether plaintiffs are

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[3] Plaintiffs also contend that they received concrete, personal benefits as a direct result of this suit, in that each was selected in 1997 as a presiding election judge and the 1997 legislation was precleared under § 5, and that the goals of their suit were achieved when the Supreme Court ruled that § 5 preclearance is required when changes are made to the procedures used to select presiding election judges. The court need not address these grounds of plaintiffs' motion.

prevailing parties based on having obtained against defendants an enforceable judgment or comparable relief through a consent decree or settlement. *See Farrar v. Hobby*, 506 U.S. 103, 111 (1992).

A

The court holds that plaintiffs did prevail with respect to their request for a temporary restraining order to enjoin the September 3, 1996 order.

Defendants maintain that plaintiffs are not prevailing parties because the court's order was temporary and was not followed by a preliminary or permanent injunction. Assuming arguendo that the temporary nature of the order deprived plaintiffs of prevailing party status, the court finds for the reasons stated below that the instant suit was a substantial factor or significant catalyst in causing Dallas County to rescind the September 3, 1996 order and adopt the October 8, 1996 order.

Defendants also assert that plaintiffs' suit was not an impetus for changing the September 3, 1996 order because their counsel informed plaintiffs before suit was filed, and advised the court at the time it considered the application for a temporary restraining order, that Dallas County planned to rescind, at the next meeting of the Commissioners Court, any formulas for appointing election judges. Defendants have offered no plausible explanation, however, for why – absent the instant lawsuit – the Commissioners Court would undo within a matter of weeks a duly adopted order for appointing election judges.

Plaintiffs are therefore entitled to recover their

attorney's fees and expenses in securing the temporary restraining order.

B

Plaintiffs did not prevail in the *Farrar* sense, however, with respect to the balance of their suit. The three-judge court dismissed this case for failure to state a claim. *Foreman v. Dallas County, Tex.*, Civil Action No. 3:96-CV-2764-D, order at 1 (N.D.Tex. Feb. 7, 1997). The Supreme Court did not decide the case on the merits. Despite its conclusion that the preclearance requirements of § 5 of the Voting Rights Act apply to changes in the method of appointing election judges, *Foreman*, --- U.S. at ----, 117 S. Ct. at 2358, it held that because the record was silent concerning the procedure used on November 1, 1972, "we cannot make a final determination here as to whether preclearance is in fact required." *Id.* at ----, 117 S. Ct. at 2358-59. The Court accordingly vacated the judgment of the three-judge court and remanded for further proceedings. *Id.* at ----, 117 S. Ct. at 2359. Its interlocutory ruling – which did not finally decide whether Dallas County's October 8, 1996 order required preclearance – did not confer prevailing party status on plaintiffs. *See Hewitt v. Helms*, 482 U.S. 755, 760 (1987).

By the time the three-judge court considered the case on remand, the Texas Legislature had already amended the Texas Election Code, Dallas County had adopted the Gubernatorial method for appointing election judges, and plaintiffs had each been appointed as presiding election judges, thereby rendering plaintiffs' case largely moot. *Foreman*, 990 F. Supp. at 509 (holding that "plaintiffs' suit is largely moot"). To the extent that the case was not moot, the court rejected plaintiffs' claims on the merits. *Id.* at 515.

"No material alteration of the legal relationship between the parties occurs until the plaintiff becomes entitled to enforce a judgment, consent decree, or settlement against the defendant." *Farrar*, 506 U.S. at 113. Except for the temporary restraining order, plaintiffs obtained no such judgment, consent decree, or settlement in this case. They do not qualify on this basis as prevailing parties.

III

A

Relief need not be judicially decreed, however, in order to justify a fee award. *Hewitt*, 482 U.S. at 760; *see Craig v. Gregg County, Tex.*, 988 F.2d 18, 21 (5th Cir. 1993). Plaintiffs may still recover fees, expenses, and costs if they establish that this lawsuit was "a substantial factor or a significant catalyst in motivating the defendants to end their . . . behavior." *Williams v. Leatherbury*, 672 F.2d 549, 551 (5th Cir. 1982) (quoting *Robinson v. Kimbrough*, 652 F.2d 458, 466 (5th Cir. 1981)). To meet this burden, plaintiffs do not have to prove that their lawsuit was the sole reason for the defendants' rectifying actions. It is sufficient if they show that their "actions made an important contribution to the improvements achieved." *Posada v. Lamb County*, 716 F.2d 1066, 1072 (5th Cir. 1983). So long as the lawsuit is a significant contributing factor, it need not be the sole causative factor. *Id.*; *Leroy v. City of Houston*, 831 F.2d 576, 580 (5th Cir. 1987). The inquiry is intensely pragmatic and factual. *Posada*, 716 F.2d at 1072. The chronology of events is a relevant and important consideration. *Craig*, 988 F.2d at 21 (citing *Hennigan v. Ouachita Parish Sch. Bd.*, 749 F.2d 1148, 1152 (5th Cir. 1985)).

B

In the present case, Dallas County did not change to the Gubernatorial method for appointing election judges in 1997 as a direct consequence of this lawsuit. It did so because the Texas Legislature altered § 32.002 of the Texas Election Code to mandate this method of appointing election judges. Plaintiffs recognize that to establish that their lawsuit was a substantial factor or significant catalyst, they must demonstrate that the suit was a significant contributing factor in causing the Texas Legislature to modify the Texas Election Code. *See* Ps. Br. at 3 (contending that "plaintiffs can show this suit was a catalyst for remedial legislation enacted in 1997 that prescribed a new procedure for choosing presiding election judges") & 11 (arguing that "the chronology of events supports the conclusion that the remedy enacted by the Texas Legislature and implemented in Dallas County in 1997 was caused, at least in substantial and significant part, by the plaintiffs' lawsuit"); Ps. Rep. Br. at 5 n.3 (contending that this lawsuit "directly led to a change in defendants' conduct, and that this lawsuit produced that change by provoking the Legislature to enact a bill constraining the discretion of Dallas County officials in the manner of selecting presiding election judges").

It is possible for plaintiffs to recover attorney's fees when their lawsuit is a substantial factor or significant catalyst in producing state-wide legislation that effects the voting change that they seek locally. In *Williams* the Fifth Circuit affirmed a decision of this court (Mahon, J.) denying such fees, but did so because the lower court's factual findings concerning the absence of a causal link were not clearly erroneous. *Williams*, 672 F.2d at 551. The panel noted that the district court might well have taken another view of the evidence (i.e., awarded fees), thus intimating that a fee award would have

been legally permissible had the evidence demonstrated the requisite causal link between plaintiffs' suit (a challenge to at-large election of school board trustees) and the Texas law (which mandated single member district elections). *Id.*[4]

Plaintiffs have submitted pertinent evidence from three members (one Senator and two Representatives) of the Texas Legislature in support of their assertion of a causal connection between this suit and the revision of § 32.002. According to their evidence, in January 1997 Senator Royce West ("Senator West"), a Texas Senator whose district includes a large part of Dallas County, introduced S.B. 130, which required that counties adopt the Gubernatorial method. West Decl. at ¶¶ 1 & 3. Senator West had opposed the Commissioners Court's orders in the fall of 1996, helped spur and pursue the instant suit, and introduced S.B. 130 to address Dallas County's decision to appoint only Republicans as presiding election judges. *Id.* at ¶¶ 2 & 4. Senator West testified that the lawsuit served as a catalyst for the introduction of S.B. 130, *id.* at ¶ 6, and there was a direct causal link between the lawsuit and the legislation that amended § 32.002, *id.* at ¶ 7.

Representative Terri Hodge ("Representative Hodge"),

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[4] Defendants maintain that in the Fifth Circuit, the notion that a lawsuit was a catalyst for passage of general legislation is not favored. The case on which they rely, *Milton v. Shalala*, 17 F.3d 812 (5th Cir. 1994), is distinguishable on its facts. In *Milton* an individual plaintiff, who was among literally thousands of litigants, attempted to recover attorney's fees under a catalyst theory following enactment of a social security reform statute that entitled him to obtain a remand of his application for disability benefits. The panel agreed with the cases that refuse to credit a change in law to a claimant's individual suit and that find the nexus between Congress' action and the lawsuit to be too attenuated. *Id.* at 815. In the present case, for the reasons the court explains below, plaintiffs have made a sufficient showing of the requisite nexus.

a member of the Dallas County delegation in the Texas House of Representatives, testified that the lawsuit caused her and other delegation members to introduce and work for passage of legislation that would remedy the problem that was the focus of this suit. Hodge Decl. at ¶ 3. According to Representative Hodge, many of her colleagues in the House and Senate agreed that legislation was needed to prevent one political party from controlling all the appointments of presiding election judges. *Id.* at ¶ 5. Representative Hodge also averred that the lawsuit was a catalyst in bringing about the legislative solution to the problem. *Id.* The three-judge court's denial of an injunction, and the pendency of the appeal to the Supreme Court, emphasized to other legislators the need and desire for remedial legislation. *Id.* The lawsuit provoked the Legislature to act and caused it to remedy the situation in Dallas County and ensure that it would never happen again in Dallas County or elsewhere. *Id.* at ¶ 7.

Representative Debra Danburg ("Representative Danburg"), Chair of the Texas House Committee on Elections, and a member of the House of Representatives from Harris County, testified that she introduced H.B. 331, the Omnibus Election Bill, which eventually became the law that *inter alia* amended § 32.002. Danburg Decl. at ¶¶ 3-5.[5] Her reasons for introducing the legislation were in part the result of the actions taken by the Commissioners Court in 1996 and to prevent similar actions in the future in Dallas County and elsewhere. *Id.* at ¶ 3. Representative Danburg testified that the instant lawsuit served as a catalyst for introducing H.B. 331, *id.* at ¶ 5, and opined that the unfairness complained of in this lawsuit was a causal factor in the action taken by the Legislature. *Id.*

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[5] Senator West's bill, S.B. 130, was rolled into H.B. 331. Danburg Decl. at ¶ 4; West Decl. at ¶ 5.

at ¶ 6.

C

Defendants oppose the competence of plaintiffs' evidence on various grounds, and contend for other reasons that the evidence is insufficient to establish the requisite causal link.

1

Defendants first contend that plaintiffs' evidence is inadmissible because it is not based on personal knowledge and because individual legislators are incompetent to testify concerning the intent of a legislature as a whole. The court rejects these assertions. Defendants have failed to show that Senator West and Representatives Danburg and Hodge were not testifying based on personal knowledge. The nature of their testimony indicates that they were. And defendants acknowledge, as they must, that the authorities on which they rely concerning the competence of an individual legislator to address the issue of legislative intent in the context of the meaning of a statute, do not apply in deciding whether he can testify that a particular lawsuit was causally related to the legislature's decision to enact the statute.

2

Defendants also advance the following arguments in opposition to plaintiffs' claim. (1) The chronology of events defeats plaintiffs' catalyst theory because a bill virtually identical to H.B. 331 was introduced in the 1995 legislative session as part of an Omnibus Election Bill, the bill passed the House during that session and was automatically refiled in the 1997 session, and the Speaker of the House instructed the

House Committee on Elections to study the matters contained in that bill in anticipation of the 1997 legislative session. (2) The lawsuit could not have been a catalyst because in order to obtain passage of the bill, its supporters intentionally stressed the need for bipartisan selection of election judges and intentionally avoided discussing this lawsuit. The suit would have been a detriment to passage, not a catalyst. The legislative record contains only a single reference to the lawsuit, a comment by a witness on behalf of the Texas Democratic Party, made during a meeting of the Senate State Affairs Committee.[6] (3) The fact that the bill affected the entire state is inconsistent with the assertion that the Texas Legislature intended to address this suit. Because most Senators and Representatives do not represent Dallas County, it is more likely that they acted for general policy reasons rather than changed the election systems in the counties they represent merely to remedy a problem in a county that they do not represent.

Defendants' arguments undoubtedly have some theoretical appeal. Common sense dictates that legislators act for myriad reasons and often with the principal intent of satisfying the interests of their constituents. Individual legislators may have viewed a law that ties the selection of

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[6] The court declines to accept defendants' "stealth catalyst" argument, in which they contend that this suit could not have caused the Texas Legislature to act because the proponents of the legislation deliberately chose not to the discuss the lawsuit, or to attack Republicans in Dallas County, in order to obtain broad bipartisan support. The evidence that plaintiffs introduced states that the lawsuit was not openly discussed, that is, that there were no attacks on Dallas County officials in legislative hearings or debates, not that it was not discussed among legislators. *See* Hodge Decl. at ¶¶ 5-6. Defendants' evidence of the absence of *public* comment merely corroborates plaintiffs' position, and does not address the private dynamics of individual legislator interaction.

presiding election judges to the success of a party's candidate for governor, rather than upon the composition of the local county's commissioners court, as fairer to both major political parties or, for partisan reasons, as a more palatable allocation of political power. Additionally, the Gubernatorial method adopted in 1997 was part of an Omnibus Election Bill that passed the House in 1995, prior to the filing of this suit. Nevertheless, the question the court must decide is "intensely factual." *Posada*, 716 F.2d at 1072. Defendants' opposition to plaintiffs' fee application is devoid of the facts necessary to counter plaintiffs' proof.

In its January 9, 1998 order prescribing the procedure for submission of attorney's fees materials, the court stated that it would decide plaintiffs' motion on the papers, in accordance with Rule 43(e), unless a controlling credibility question was presented. Jan. 9, 1998 Order at 2. Plaintiffs have introduced evidence from the Senate and House sponsors of the bills that culminated in the amendment to § 32.002, and from another member of the House. These witnesses have testified without contradiction that this lawsuit was a catalyst and that there was a causal link between the litigation and enactment of revised § 32.002. Apart from challenging the legal competence of the witnesses to testify concerning the catalytic and provocative nature of the lawsuit, defendants have neither questioned the credibility of this evidence nor introduced proof of their own from other legislators to counters plaintiffs' evidence. Instead, what they have primarily done is explain why they think plaintiffs' evidence supports their arguments. Under a preponderance of the evidence standard, however, the court is left inescapably with evidence from the House and Senate sponsors, including the Chair of the Texas House Committee on Elections and sponsor of the bill that eventually became law, that this lawsuit played a significant role in causing the

Legislature to amend § 32.002. Plaintiffs do not have to prove that their actions were the sole reason, but need only show that this lawsuit made an important contribution and was a significant contributing factor. Plaintiff's proof is sufficient to satisfy their evidentiary burden, by a preponderance of the evidence, that the lawsuit played such a role in provoking the 1997 revision to § 32.002.

IV

Having determined that plaintiffs are entitled to recover their attorney's fees, the court must now consider defendants' challenges to the sum requested.

In opposition to the amount of the award, defendants repeat their assertion that plaintiffs are not prevailing parties, argue that plaintiffs obtained only de minimis or merely technical relief that does not support any fee award, contend that one attorney's hourly rate is unreasonable, and posit that plaintiffs at most obtained limited relief in the form of a temporary restraining order, thus justifying a modest fee.

The court has considered each of the relevant factors for an attorney's fees award. *See, e.g., Hensley v. Eckerhart*, 461 U.S. 424, 433-37 (1983). Absent any challenge to the evidence that pertains to those factors – apart from the assertion that the hourly rate charged by Kenneth H. Molberg, Esq. ("Molberg") is excessive – the court need not address them in detail. The court finds that plaintiffs' request for fees and expenses of $183,263.95 is amply supported by the record. Defendants' attacks on Molberg's hourly rate are refuted by record evidence that supports the rate of $285.00 per hour. *See* Molberg Decl. at ¶¶ 2, 5(a)-(g), 12, & 13. The court finds that his hourly rate is reasonable. The court also rejects defendants' assertion that plaintiffs obtained only limited relief. Having concluded that

this lawsuit was a substantial factor and significant catalyst in causing Dallas County, via the Texas Legislature, to replace its method for appointing election judges, and in view of the Supreme Court's decision that § 5 preclearance requirements apply to changes in such appointment methods, it follows that plaintiffs achieved more than *de minimis* or merely technical relief.

* * *

Plaintiffs' motion for an award of attorney's fees, expenses, and costs is granted, and it is ordered that they recover from defendant Dallas County the sum of $183,263.95.

SO ORDERED.

June 25, 1998.

/s/ Sidney A. Fitzwater
SIDNEY A. FITZWATER
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 98-10864

B C FOREMAN; IDA CLARK; OTIS TARVER; DOMINIC DE LA CRUZ; LOUIS DAVIS; MANDY PESINA

Plaintiffs - Appellees

v.

DALLAS COUNTY TEXAS; COMMISSIONERS COURT OF DALLAS COUNTY TEXAS; LEE F JACKSON, Dallas County Judge; JIM JACKSON; JOHN WILEY PRICE; MIKE CANTRELL; KENNETH A MAYFIELD, Dallas County Commissioners; BRUCE SHERBET, Elections Administrator of Dallas County Texas

Defendants - Appellants

Appeal from the United States District Court for the Northern District of Texas, Dallas

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ON PETITION FOR REHEARING EN BANC
(Filed Nov. 9, 1999)

Before SMITH, DeMOSS and STEWART, Circuit Judges.

PER CURIAM:

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Harold R. DeMoss, Jr.
United States Circuit Judge

Judges Politz and Higginbotham did not participate in the consideration of the rehearing en banc.

APPENDIX F

42 U.S.C. § 1973c

§ 1973c. Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the

effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

42 U.S.C. § 1973*l*

1973*l*. Enforcement proceedings

* * *

(c) Attorney's fees

In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Texas Election Code § 32.002(c)

§ 32.002. Judges for County Election

* * *

(c) The presiding judge and alternate presiding judge must be affiliated or aligned with different political parties, subject to this subsection. Before July of each year, the county chair of a political party whose candidate for governor received the highest or second highest number of votes in the county in the most recent gubernatorial general election shall submit in writing to the commissioners court a list of names of persons in order of preference for each precinct who are eligible for appointment as an election judge. The commissioners court shall appoint the first person meeting the applicable eligibility requirements from the list submitted in compliance with this subsection by the party with the highest number of votes in the precinct as the presiding judge and the first person meeting the applicable eligibility requirements from the list submitted in compliance with this subsection by the party with the second highest number of votes in the precinct as the alternate presiding judge. The commissioners court may reject the list if the persons whose names are submitted on the list are determined not to meet the applicable eligibility requirements.

* * *

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

B.C. FOREMAN; IDA CLARK; OTIS TARVER; DOMINIC DE LA CRUZ; LOUIS DAVIS; and MANDY PESINA,	)Civil Action No.)3:96-CV-2764-D
Plaintiffs,	
v.	
DALLAS COUNTY, TEXAS; COMMISSIONERS' COURT OF DALLAS COUNTY, TEXAS; LEE F. JACKSON, County Judge of Dallas County, Texas; JIM JACKSON, MIKE CANTRELL, JOHN WILEY PRICE, and KENNETH A. MAYFIELD, County Commissioners of Dallas County, Texas; and BRUCE R. SHERBET, Elections Administrator of Dallas County, Texas,	
Defendants.	

DECLARATION OF ROYCE WEST

Pursuant to 28 U.S.C. § 1746, I declare that:

1. My name is Royce West. I reside in Dallas County, Texas. I am a practicing attorney in Dallas, Texas, and a member of the Texas State Senate. My senate district, District 23, includes a part of Dallas County and a part of Tarrant County. I am executing this Declaration at the request of counsel for the plaintiffs in the above-captioned case.

2. In the Fall of 1996, I appeared before a public meeting of the Dallas County Commissioners Court concerning actions that the Commissioners Court was planning to take with regard to changing the procedures for choosing presiding election judges. At that time, the Commissioners Court was considering a change in the procedures for selecting judges that would have chosen only Republicans to serve as presiding judges. I appeared before the Commissioners Court to oppose the planned change and I urged members of the Commissioners Court to maintain some degree of bipartisanship in the selection of presiding election judges. Despite my concerns, the Commissioners Court appointed new presiding judges on October 6, 1996, and only Republicans were named as presiding judges. As a result, the current lawsuit was pursued. I was involved personally in discussions with plaintiffs' counsel Kenneth H. Molberg about pursuing this litigation, and I am one of those individuals who helped spur this lawsuit. Plaintiffs' counsel and I actively conferred about the plan to challenge the Commissioners' actions through litigation. It was my hope that this case or the information obtained during the course of the case would correct or help correct what I believed to be a violation of the Voting Rights Act.

3. In January 1997, the Texas Legislature was convened in regular session. During that session, I introduced legislation, Senate Bill 130, that prescribed a new and uniform method of selecting presiding election judges in counties throughout the state of Texas. Under this legislation, the county chair of a political party whose candidate received the highest or second highest number of votes in the county in the most recent gubernatorial general election is to submit a list of names of persons in order of preference for each precinct who are eligible for appointment as election judges. A copy of the Senate Bill I introduced is attached hereto.

4. In January 1997, I introduced legislation that was intended to resolve the situation in Dallas County and the issues raised in this lawsuit. I did so because I was extremely concerned that Dallas County had appointed only members of one political party to serve as presiding election judges. I felt that legislation was needed which would constrain the discretion available to county officials, and that specific procedures should be put in place to insure bipartisanship with regard to future procedures used to select presiding judges. I also believed that positions of presiding election judges, whose duties should be carried out in a nonpartisanship fashion, should not be used as instruments of partisanship, as had been done by Dallas County in 1996. The instant lawsuit highlighted the extreme partisan position taken by the Dallas County Commissioners Court in 1996, and the burden imposed on ordinary citizens who were forced to go to court and challenge Dallas County's conduct as violative of the Voting Rights Act.

5. The legislation I introduced, SB 130, passed the Texas Senate and was sent over for approval in the House. Upon the request of State Rep. Debra Danburg in the House, the author of similar legislation, I agreed to allow the Omnibus

Election Bill, HB 331, to serve as the vehicle to achieve the goals set forth in SB 130. The Omnibus Election Bill, which was approved by both the Texas senate and house, was signed into law by Governor Bush.

6. As indicated, at the time I introduced SB 130, I was aware that the instant lawsuit had been filed in the Fall of 1996. The instant lawsuit filed against the County Commissioners Court by the plaintiffs herein, and the proceedings in that lawsuit, served as a catalyst for the introduction of legislation in the Texas Legislature, which ultimately became law, and changed the procedures for selecting presiding election judges in Texas.

7. As a result of this lawsuit and the passage of new procedures that now govern the selection of presiding election judges, there has been a change in the behavior of the defendants. Indeed, the Dallas County Commissioners Court appointed new presiding judges in October 1997, and pursuant to the new procedures requiring the results of the last gubernatorial election to be used as the basis for appointment, both Democrats and Republicans have been appointed as presiding election judges. There is a direct causal link between this lawsuit and the legislation that passed the Texas legislature in 1997 prescribing new procedures for selecting presiding election judges, and thus there is also a direct causal link between this lawsuit and the change brought about in the defendants' behavior in 1997 when Dallas County selected new presiding election judges pursuant to the procedures established in SB 130, which ultimately became law.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 12 day of February, 1998.

/s/ Royce West
ROYCE WEST

APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

B.C. FOREMAN; IDA CLARK; OTIS TARVER; DOMINIC DE LA CRUZ; LOUIS DAVIS; and MANDY PESINA,	)))))Civil Action No.)3:96-CV-2764-D
Plaintiffs,	)
v.	)
DALLAS COUNTY, TEXAS; COMMISSIONERS' COURT OF DALLAS COUNTY, TEXAS; LEE F. JACKSON, County Judge of Dallas County, Texas; JIM JACKSON, MIKE CANTRELL, JOHN WILEY PRICE, and KENNETH A. MAYFIELD, County Commissioners of Dallas County, Texas; and BRUCE R. SHERBET, Elections Administrator of Dallas County, Texas,	)
Defendants.	)

DECLARATION OF DEBRA DANBURG

Pursuant to 28 U.S.C. § 1746, I declare that:

1. My name is Debra Danburg. I reside in Houston, Texas. I am a member of the Texas House of Representatives. My House district, District 137, is located within Harris County. I have been elected to the State House of Representatives since 1980. For the past four legislative sessions, I have chaired the House Committee on Elections, and was previously also a member of that committee.

2. In 1996, the Dallas County Commissioners' Court was planning to change the formula and procedures for choosing presiding elections judges. The Commissioners' Court proposed a plan that would have chosen only Republicans to serve as presiding judges. In 1996 the Dallas Commissioners Court implemented new procedures for appointing presiding precinct judges. That new procedure resulted in the appointment of only Republican Party loyalists to what had previously been a bipartisan position charged with administering fair, even-handed elections.

3. In January 1997, the Texas Legislature was convened in regular session. As Chair of the House Committee on Elections, I introduced House Bill 331 which included similar language to that introduced in Senate Bill 130 by Senator Royce West. Like Senator West, my reasons to file this legislation were, in part, a result of the actions taken by the Dallas County Commissioners' Court in 1996 and to prevent this from continuing in Dallas County or happening elsewhere in the state of Texas. The language in both pieces of legislation prescribed a new and uniform method of selecting presiding election judges in counties throughout the state of Texas. Under these proposals, the county chair of a political party

whose candidate received the highest or second highest number of votes in the county in the most recent gubernatorial general election is to submit a list of names of persons in order of preference for each precinct who are eligible for appointment as election judges. The commissioners' court is to appoint the first person meeting the applicable eligibility requirements from the list submitted in compliance by the party with the highest number of votes in the precinct as the presiding judge.

4. Senate Bill 130 passed the Texas Senate and was sent over to the House for approval. As the legislative session drew to a close, Senator West agreed to let his bill get rolled into H.B. 331, the Omnibus Election Bill, that had already passed the Texas House. Senator West's bill was eventually included in the Omnibus Election Bill, which was approved by both the Texas Senate and House and was signed by Governor Bush.

5. During the 75th Legislative Session when the House Committee on Elections was meeting, I was aware that the instant lawsuit had been filed in the Fall of 1996. The instant lawsuit filed against the County Commissioners' Court by the plaintiffs herein served as a catalyst for the introduction of legislation in the Texas legislature, which ultimately became law, and changed the procedures for selecting presiding election judges in Texas.

6. It is my understanding that as a result of the lawsuit and the passage of H.B. 331, which included provisions originally proposed in S.B. 130, that now govern the selection of presiding election judges, there has been a change in the behavior of the defendants. It is my opinion that the unfairness complained of in this lawsuit was a causal factor in the action taken by the Legislature.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: Feb. 12, 1998

/s/ Debra Danburg
DEBRA DANBURG

APPENDIX I

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

B.C. FOREMAN; IDA CLARK; OTIS TARVER; DOMINIC DE LA CRUZ; LOUIS DAVIS; and MANDY PESINA,	)))))Civil Action No.)3:96-CV-2764-D
Plaintiffs,	)
v.	)
DALLAS COUNTY, TEXAS; COMMISSIONERS' COURT OF DALLAS COUNTY, TEXAS; LEE F. JACKSON, County Judge of Dallas County, Texas; JIM JACKSON, MIKE CANTRELL, JOHN WILEY PRICE, and KENNETH A. MAYFIELD, County Commissioners of Dallas County, Texas; and BRUCE R. SHERBET, Elections Administrator of Dallas County, Texas,	)
Defendants.	)

DECLARATION OF TERRI HODGE

Pursuant to 28 U.S.C. § 1746, I declare that:

1. My name is Terri Hodge. I reside in Dallas, Texas. I am a member of the Texas State House of Representatives. My House district, District 100, is located within Dallas County. I was elected to the State House of Representatives in 1996 and in the 1997 legislative session, I served as a member of the House Elections Committee.

2. In the Fall of 1996, I learned that the Dallas County Commissioners Court was planning to change the formula and procedures for choosing presiding election judges. At that time, the Commissioners Court was considering a change in the procedures for selecting judges that would have chosen only Republicans to serve as presiding judges. I was appalled by the planned actions to be taken by Dallas County not only because it would result in only Republicans serving as presiding judges, but also because it would have converted the position of presiding judge, whose duties should be carried out in an evenhanded and nonpartisan manner, into a purely partisan one. Despite my concerns, the Commissioners Court appointed new presiding judges on October 6, 1996, and only Republicans were named as presiding judges. Dallas County's changes in the method of choosing presiding judges were the subject of many conversations I had with my constituents, and with other members of the Texas legislature in Dallas County.

3. In the Fall of 1996, I became aware that this lawsuit had been filed in federal court by several minority citizens challenging the actions of the County Commissioners Court

under the Voting Rights Act. This lawsuit also was the subject of numerous conversations I had with certain members of the Dallas County legislative delegation over the need for legislation to remedy the problem that was the focus of this lawsuit, viz. the need to establish uniform, bi-partisan procedures for selecting judges and to obtain Voting Rights Act scrutiny of any further changes by county officials. Because the actions of the Dallas County Commissioners Court in the Fall of 1996 was aimed at removing all Democrats as presiding judges, I discussed this lawsuit with Democratic members of the Dallas County legislative delegation to plan corrective action the Legislature could take to remedy the problem in Dallas County. This lawsuit caused me and other members of the Dallas County legislative delegation to introduce legislation and to work for its passage that would bring about a bi-partisan method of selecting presiding election judges. We were aware that efforts had been made in the 1995 session to enact such legislation but the bill had died in the Texas Senate. We felt that this lawsuit, attacking egregious actions by the Dallas County Commissioners Court, would give us the impetus to pass remedial legislation in the 1997 session.

4. In January 1997, the Texas Legislature was convened in regular session. During that session, I supported legislation that prescribed a new and uniform method of selecting presiding election judges in counties throughout the state of Texas. Under this legislation, the county chair of a political party whose candidate received the highest or second highest number of votes in the county in the most recent gubernatorial general election would submit a list of names of persons in order of preference for each precinct who would be eligible for appointment as election judges. Support for this bill was led by Senator Royce West from Dallas County, who introduced it in the Senate. Senator West's bill eventually

became a part of the omnibus election bill that was enacted in 1997 and became law.

5. During the 1997 session, I spoke to many of my colleagues in the Texas Legislature (both in the House and Senate) about the need to enact legislation that would remedy the problem created in Dallas County in the Fall of 1996 and was the subject matter of this lawsuit. Many of my colleagues in the Texas Legislature spoke to me about this issue and I recall that they agreed with me that legislation was needed which would prevent one political party from controlling all of the appointments of presiding judges. Because we felt that such legislation would pass more easily if it was publicized as a bi-partisan bill that would govern future appointments of presiding judges, there was little discussion in the Texas Legislative record about what had been done in Dallas County or the fact that this lawsuit had been filed to attack Dallas County's actions. That is not to say, however, that Dallas County's 1996 actions appointing only Republicans and this lawsuit were not discussed by members of the legislature. This lawsuit was a catalyst in bringing about the legislative solution, as it highlighted the partisan manipulation of selecting presiding election judges that was possible by highly political county officials, such as those in Dallas County. The fact that no injunction had been issued by this court in response to the lawsuit, a fact which was known to me and other members of the Texas Legislature, only served to emphasize the need for remedial legislation. We knew the case was on appeal to the Supreme Court but felt that the lawsuit had illuminated the need and desire for a legislative solution.

6. There is little if any open discussion about Dallas County's highly partisan 1996 actions triggering the remedial legislation during the 1997 session. Nor was there discussion

about this lawsuit. This was by design. We knew that to get the legislation passed with broad support, it would be possible to obtain support from both sides of the aisle if the bill did not attack Republicans in Dallas County or the lawsuit that had been brought against the Dallas County Commissioners Court. To insure support for the measure from Republicans, Democratic members of the Legislature from Dallas County made a conscious effort not to attack Dallas County officials in legislative hearings or debates. Attacking Republicans or trumpeting this lawsuit, rather than pushing a need for bi-partisanship in the selection of presiding judges, would have been seen as engaging in the same kind of partisanship that we were trying to prevent. This strategy worked, as the measure prescribing a bi-partisan selection of presiding judges (based on results from the last Governor's race) eventually passed the Texas Legislature with broad support (including Republican support and the support of Dallas County election officials).

7. This lawsuit provoked the Legislature to act. The focus of this lawsuit was the action of the Dallas County Commissioners Court to appoint only Republicans as presiding judges, and to do so without being subject to the Voting Rights Act's preclearance requirements. This case caused the Legislature to remedy the situation in Dallas County and to insure that it would never happen again in Dallas County or any other county in Texas.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: 2-10-98 /s/ Terri Hodge
TERRI HODGE

APPENDIX J

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

B.C. FOREMAN; IDA CLARK; OTIS TARVER; DOMINIC DE LA CRUZ; LOUIS DAVIS; and MANDY PESINA,	)Civil Action No.)3:96-CV-2764-D
Plaintiffs,	)
v.	)
DALLAS COUNTY, TEXAS; COMMISSIONERS' COURT OF DALLAS COUNTY, TEXAS; LEE F. JACKSON, County Judge of Dallas County, Texas; JIM JACKSON, MIKE CANTRELL, JOHN WILEY PRICE, and KENNETH A. MAYFIELD, County Commissioners of Dallas County, Texas; and BRUCE R. SHERBET, Elections Administrator of Dallas County, Texas,	)
Defendants.	)

DECLARATION OF STEVE McDONALD

Pursuant to 28 U.S.C. § 1746, I declare that:

1. My name is Steve McDonald. I reside at 2001 Parker Lane, #122, Austin, Texas 78741. I am employed by the Texas Democratic Party as Comptroller and Liaison to the Texas Legislature. I have been an employee of the Texas Democratic Party since 1990.

2. My duties as Comptroller and Liaison to the Texas Legislature include monitoring legislation in the Texas Legislature that affects Democratic Party interests or is of interest to the Democratic Party. In the course of my regular duties, it is my responsibility to prepare and present testimony to the Texas Legislature on proposed legislation.

3. In early 1995, information came to my attention from an official in the Dallas County Elections Administrator's office that the Dallas County Commissioners' Court was planning to replace all of its Democratic presiding election judges with Republicans. The possibility that the Dallas County Commissioners' Court would replace all of the Democratic presiding election judges with Republicans prompted Democratic legislators from Dallas County to introduce legislation during the 1995 session that would have required the appointment of the presiding election judges from the political party whose candidate for Governor in the last election won the respective precinct. Although this legislation passed in the Texas House in the 1995, it died in the Texas Senate.

4. In the Fall of 1996, I learned that the Dallas County Commissioners' Court had replaced all of it Democratic

presiding election judges with Republicans. I also learned that a lawsuit had been filed in federal court by minority voters and former Democratic presiding election judges to block this action by the Dallas County Commissioners' Court. These events in Dallas County were widely reported in the media.

5. In the 1997 session of the Texas Legislature, legislation was introduced to remedy the Republican-only method of selecting election judges that had been instituted by Dallas County in 1996 and was the subject of this lawsuit. In the senate, the legislation to prescribe a new method of selecting election judges was introduced by Senator Royce West from Dallas. The bill introduced by Senator West, S.B. 130, provided, among other things, that the commissioners court in each county appoint as the presiding judge in the respective precincts that person recommended by the political party whose candidate for Governor had received the highest number of votes in the most recent gubernatorial election. S.B. 130 also provided that the commissioners court in each county appoint as the alternate judge that person recommended by the political party whose candidate for governor had received the second highest number of votes in the most recent gubernatorial election.

6. I had conversations in early 1997 with Senator Royce West, Representative Terri Hodge, and Representative Jesse Jones (as well as their staff members and staff members of other members of the Texas Legislature) about the need and desire to enact legislature to overturn the actions taken by the Dallas County Commissioners' Court concerning changes in the procedures for selecting presiding election judges that had taken place in the Fall of 1996. I also recall discussing this needed legislation with Senators Ellis's and Cain's staff. According to Senator West, the appointment of all Republicans

as presiding judges by Dallas County in 1996, and this lawsuit challenging Dallas County's appointments of only Republican presiding judges in 1996, motivated Senator West to propose and file S.B. 130 in 1997. Since a bill prescribing the gubernatorial appointment method of choosing election judges had passed the Texas House in 1995, it was automatically refiled in the Texas House by Rep. Debra Danburg in 1997. Rep. Danburg's 1997 bill was similar to Senator West's S.B. 130.

7. S.B. 130 passed the Texas Senate. Meanwhile an omnibus election bill passed the House and was sent over to the Texas Senate. Senator West's S.B. 130 was rolled into the House omnibus election legislation. Senator West's bill, S.B. 130 became law and is codified in § 32.002.

8. I testified in both the House and Senate concerning amendments to Texas' election laws, including S.B. 130. I testified in support of S.B. 130 and the change to a bi-partisan, gubernatorial method of selecting presiding judges. In my testimony before the Texas Senate, I testified that the legislation should pass and I cited this lawsuit brought against the Dallas County Commissioners' Court as a reason that legislation was needed to prescribe a specific, bi-partisan method of appointing presiding election judges. Senator West sat next to me during my testimony before the senate on this matter.

9. It is my opinion that Dallas County's change in 1996 to select only Republicans as presiding election judges, and this lawsuit challenging such actions by the Dallas County Commissioners' Court, were the significant catalyst in bringing about the passage of legislation in 1997 that prescribed a gubernatorial method of appointing election judges in Texas.

Similar legislation had failed in 1995, but that legislation, which was triggered by information that the Dallas County Commissioners' Court was intending to select only Republicans as presiding election judges, failed in 1995. When Dallas County carried through with their threat to appoint only Republicans in 1996, this lawsuit was filed. It is my opinion that the passage in 1997 of the gubernatorial appointment method of selecting judges that was included in Senator West's bill was a direct result of the uproar caused by the Dallas County Commissioner's Court's 1996 decision to appoint only Republicans as presiding judges and this lawsuit challenging the Commissioners' Court's actions. This lawsuit provoked the Legislature into action in passing Senator West's bill.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 11 day of February, 1998

/s/ Steve McDonald
STEVE McDONALD

Supreme Court, U.S.
FILED
MAR - 8 2000
CLERK

(2)

No. 99-1334

In The

Supreme Court of the United States

B. C. FOREMAN, IDA CLARK, OTIS TARVER, LOUIS DAVIS, AND MANDY PESINA,

Petitioners,

v.

DALLAS COUNTY, TEXAS; COMMISSIONERS COURT OF DALLAS COUNTY, TEXAS; LEE F. JACKSON, DALLAS COUNTY JUDGE; JIM JACKSON, JOHN WILEY PRICE, MIKE CANTRELL, AND KENNETH MAYFIELD, DALLAS COUNTY COMMISSIONERS; AND BRUCE SHERBET, ELECTIONS ADMINISTRATOR OF DALLAS COUNTY, TEXAS,

Respondents.

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

The recitation of facts in the Fifth Circuit's opinion provides an objective and complete statement of the case, and Dallas County[1] believes it is an appropriate summary on which this Court can rely. The "Statement" in Foreman's[2] petition is generally accurate; however, some correction and amplification is necessary.

First, Foreman speaks of the plaintiffs' goal "to force [Dallas County] to adopt a racially and ethnically nondiscriminatory . . . method [of appointing election judges]" and claims that attainment of this goal entitles him to attorneys' fees. Pet. at 4; *see also* Pet. at 2, 5. While Foreman's personal goal may have been to have Dallas County adopt a new procedure for appointing election judges, that is not what he sought in his lawsuit and is nowhere reflected in the record. As the Fifth Circuit stated, this alleged goal was "relief which was never demanded, or even made clear, in the plaintiff's complaint." Pet. App. at 12a.

Second, Foreman claims to have prevailed in 1997 when this Court determined that the case had been improperly dismissed and then remanded for the district court to address the merits. Pet. at 5. The case, however,

---

[1] Defendants/Respondents Dallas County, the Commissioners Court of Dallas County, the five members of the commissioners court, and the Dallas County Elections Administrator will be referred to collectively as "Dallas County."

[2] Petitioners/Plaintiffs B. C. Foreman and four other individuals will be referred to collectively as "Foreman."

became moot before the three-judge district court could rule on the merits.[3]

When the district court considered Foreman's request for an award of attorneys' fees, it relied on *Hewitt v. Helms*, 482 U.S. 755, 760 (1987), and held that this Court's interlocutory ruling did not confer prevailing party status on Foreman. Pet. App. at 40a. Foreman did not challenge that adverse finding by cross-appeal in the Fifth Circuit. As a result, any claim based on alleged success in the 1997 interlocutory appeal was not presented to the Fifth Circuit and is not before this Court.

REASONS FOR DENYING THE WRIT

I. The Primary Question on Which Foreman Asks the Court to Grant Certiorari Is Not Presented in this Case.

Foreman urges the Court to grant certiorari to resolve whether *Farrar v. Hobby*, 506 U.S. 103 (1992), repudiated the catalyst theory for purposes of awarding attorneys' fees to prevailing civil rights plaintiffs. *See* Pet. ("Questions Presented"). That question, however, is not presented in this case.

---

[3] The district court dismissed the case "in part as moot and in part on the merits." *Foreman v. Dallas County*, 990 F. Supp. 505, 515 (N.D. Tex. 1998) (three-judge court). The court determined that the case was moot except for the plaintiffs' claim for lost election fees totaling $207. It then determined it had no authority to award lost election fees and dismissed that portion of the suit on the merits.

A. Foreman prevailed in the Fifth Circuit on the issue of the catalyst doctrine's viability post-*Farrar*. There is no adverse ruling for this Court to review.

Consistent with the majority of circuits, the Fifth Circuit assumed the continued vitality of the catalyst theory post-*Farrar*. Pet. App. at 10a. The court simply held that the *Foreman* plaintiffs failed to prove that they were prevailing parties under established catalyst theory standards. *See id.* ("Assuming, without deciding, that the catalyst theory still applies in this Circuit, the facts of this case do not support a finding that plaintiffs were prevailing parties under 42 U.S.C. § 1973*l*(e)."). Far from rendering an opinion that "squarely conflicts with rulings of most other circuits," as Foreman would have this Court believe, Pet. at 14, the Fifth Circuit aligned itself with the majority of circuits that recognize the catalyst theory as a viable measure of prevailing party status. In other words, Foreman *prevailed* on this threshold legal issue in the Fifth Circuit. Because Foreman suffered no adverse ruling, the issue is not presented for review. Anything the Court could write on the issue would be dicta.

The Fifth Circuit neither caused, nor exacerbated, a circuit split on the question of whether the catalyst theory remains viable post-*Farrar*. The Fourth Circuit remains the only Circuit to have held that the catalyst theory no longer exists. *See S-1 & S-2 v. State Bd. of Educ.*, 21 F.3d 49, 51 (4th Cir.) (en banc). This Court denied certiorari in that case. *See S-1 & S-2 v. State Bd. of Educ.*, 513 U.S. 876 (1994).

Recently, this Court acknowledged that the continued viability of the catalyst theory remains an open question post-*Farrar*. *See Friends of the Earth, Inc. v. Laidlaw Envl. Servs, Inc.*, ___ U.S. ___, 120 S. Ct. 693, 711 (2000) (citing circuit decisions addressing the catalyst theory post-*Farrar*).[4] The Court declined to resolve the issue in *Friends*, explaining that since the district court had neither awarded nor denied attorneys' fees "[i]t would be premature . . . for us to address the continuing validity of the catalyst theory in the context of this case." *Id.* at 711-12. Even assuming the Court wished to address this question when next presented, a grant of certiorari in this case would not accomplish that goal: *Foreman*, like *Friends*, does not present the issue. *See id; see also New York v. O'Neill*, 359 U.S. 1, 8 (1959) (stating that issue on which state supreme court "expressly refrained from ruling" presented "a hypothetical question which need not now be considered"). As *Foreman* is an inappropriate vehicle for considering the validity of the catalyst theory post-*Farrar*, this Court should deny the petition.

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[4] Within *Friends'* collection of circuit cases, the Court cited *Foreman* and quoted dicta in which the Fifth Circuit expressed doubts about the catalyst theory. *Friends*, 120 S. Ct. at 711. The citation carried a "*cf.*" (i.e., "compare") signal to the Fourth Circuit's opinion in *S-1 & S-2*. *See id.* While dicta in *Foreman* did express doubts about the catalyst theory post-*Farrar*, the Fifth Circuit expressly declined to repudiate the catalyst theory. Instead, the court assumed the catalyst theory's validity and analyzed plaintiffs' evidence in light of traditional catalyst theory principles. *See* Pet. App. at 10a.

B. The record does not support Foreman's attempt to circumvent the absence of adversity by claiming that the Fifth Circuit's explicit application of the catalyst theory was, in reality, an implicit rejection of the doctrine.

Foreman attempts to sidestep the Fifth Circuit's assumption of the catalyst theory's continued viability by claiming that three elements of the court's reasoning make it impossible, as a practical matter, for Fifth Circuit litigants ever to prevail on a catalyst claim. Pet. at 14. None of Foreman's three rationales have any merit.

First, Foreman maintains that the district court's disallowance of relief based on receipt of a temporary restraining order eviscerates the catalyst theory, since in many cases a TRO encourages defendants to alter their conduct. Pet. at 15. Nothing in the Fifth Circuit's opinion, however, suggests that a plaintiff who is the beneficiary of a temporary restraining order cannot prevail *as a catalyst*. Indeed, neither the court of appeals nor the district court considered the temporary restraining order to be part of Foreman's catalyst claim. Instead, both assessed whether the temporary restraining order obtained by Foreman was equivalent to relief from an enforceable judgment. Pet. App. at 14a-15a, 38a-39a. Because the court of appeals' discussion of Foreman's temporary restraining order had nothing to do with the catalyst theory, the opinion will have no effect on the availability of that theory in other cases where plaintiffs argue that a temporary restraining order was a catalyst for obtaining non-judicial relief. That question was never addressed by the Fifth Circuit and is not properly before this Court.

Second, Foreman argues that the court of appeals was too strict in requiring him to show, as a condition of prevailing party status, that the relief he claims to have received was the same relief sought in the lawsuit. Pet. at 16-18. Foreman's argument is irrelevant, however, because the court of appeals "assume[d] that the plaintiffs did obtain some relief." Pet. App. at 12a. Despite that assumption, the Court still found that Foreman was not a catalyst, because "there is insufficient evidence of a causal connection between the plaintiffs' individual suit and the Texas legislature's decision to revamp the appointment procedure." *Id.* Foreman's argument suffers from the same problem that plagues his petition overall: the Fifth Circuit determined *as a matter of fact*, not law, that his lawsuit did not catalyze the legislature's action. Because Foreman was not a catalyst in fact, the catalyst legal issues he invites the Court to address are not presented.

Foreman also claims that he obtained sufficient relief to "prevail" because this Court's decision in the interlocutory appeal, *Foreman v. Dallas County*, 521 U.S. 979 (1997), represents success on the merits of his claim. Pet. at 17. The district court, relying on *Hewitt v. Helms*, 482 U.S. 755, 760 (1987), held otherwise and refused to award fees on that basis. Pet. App. at 40a. Foreman did not cross-appeal that ruling and thus has waived the issue. Because Foreman never challenged the district court's refusal to award fees on the basis of the 1997 interlocutory appeal in the Fifth Circuit, that issue cannot be raised in this Court. *See El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, ___, 119 S. Ct. 1430, 1434-36 (1999).

Third, Foreman claims that the court of appeals' failure to give conclusive effect to affidavits of individual legislators made it "impossible – as a matter of law – to demonstrate the motive of a legislature in passing a law that mooted a civil-rights suit. . . . " Pet. at 18. Foreman's complaint, though, is that the court of appeals applied the unexceptional and firmly established evidentiary principle that individual members of the legislature may not competently testify to the intent or motive of the entire legislative body. *See Bread Political Action Comm. v. Federal Elec. Comm.*, 455 U.S. 577, 582 n.3 (1982). That principle is eminently correct, because an individual legislator has no personal knowledge of the motive of the entire legislature, which in Texas consists of 181 members. If that were not the rule, courts would be in the position of deciding questions of statutory interpretation by relying on legislators' after-the-fact statements about the legislative body's motive or intent.

Foreman's claim that proof of causation will no longer be possible in cases involving a legislative remedy is hyperbole of the most extreme sort. Of course, there will be ways to prove causation in appropriate cases. Plaintiffs might rely on the chronology of events. The language of the statute might refer to the lawsuit or contain wording that comes from the suit. In some cases, the legislative record may reflect that the defendants, under the pressure of the lawsuit, came to the legislature and sought a change in the law. *See e.g., Institutionalized Juveniles v. Secretary of Pub. Welfare*, 758 F.2d 897, 917 (3rd Cir. 1985). There are countless other types of evidence that might point to a causal connection between the lawsuit and the passage of legislation.

In this case, the Fifth Circuit looked at all the evidence in the record, including the House Elections Committee Report showing that the committee was working – *prior to the filing of the lawsuit* – to introduce the legislation Foreman claims his suit catalyzed. The court concluded on the basis of this record that it was clear error to find a causal link between the lawsuit and the statutory change. The bottom line is that this case was decided on its facts, and the hypothetical legal issues Foreman invites this Court to consider are not presented for review.

C. Conspicuously absent from the petition is any mention of the novel *third-party* catalyst theory under which Foreman claims to have prevailed.

Foreman suggests that the Fifth Circuit, although purporting to apply catalyst theory standards, "overturned the fee award in a manner that will ensure that no plaintiff in the Fifth Circuit will ever succeed in obtaining fees on the basis of the catalyst theory." Pet. at 14. No such thing occurred. The Fifth Circuit faithfully applied established catalyst theory principles. The problem was that Foreman did not assert established catalyst theory grounds. Rather, Foreman claimed prevailing party status under an expansive, "third-party catalyst" theory that neither the Fifth Circuit, nor any other circuit, appears to have ever recognized.[5] Even if the legal issue of the

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[5] Although not cited to the Fifth Circuit, a Third Circuit opinion referenced in Foreman's Petition to this Court involves a catalyst claim premised on legislative action – albeit under very different circumstances. Pet. at 19 (citing *Institutionalized*

continued viability of the catalyst doctrine were presented in this case, the uniqueness and novelty of Foreman's third-party catalyst claim would make this an inappropriate vehicle for addressing general principles of catalyst doctrine.

Foreman did not, and could not, claim that Dallas County voluntarily provided relief under the pressure of the lawsuit, as contemplated in a traditional catalyst theory scenario. *See Hewitt v. Helms*, 482 U.S. 755, 761 (1987) (stating that plaintiffs could establish prevailing party status where a *defendant* voluntarily acting "under the pressure of the lawsuit" informally provides the relief sought). Instead, Foreman claimed that the lawsuit prompted a *third-party*, the Texas Legislature, to amend the Election Code in a manner that caused all 254 counties throughout Texas, including Dallas County, to adopt election judge appointment procedures that were favorable to petitioners. Not surprisingly, Foreman could provide the Fifth Circuit no authority to support his

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Juveniles v. Secretary of Pub. Welfare, 758 F.2d 897 (3d Cir. 1985)). Unlike *Foreman*, the Third Circuit case presented a situation in which a state agency defendant actively worked with the state legislature to achieve passage of legislation that provided plaintiffs relief; furthermore, plaintiffs' counsel drafted part of the legislation. *See* 758 F.2d at 917. Explicitly highlighting the unusual nature of these circumstances, the Third Circuit determined that the passage of legislation was fairly attributable to the state defendant, whose direct cooperation and involvement with the legislature provided relief. *Id.* The Third Circuit recognized, however, that the defendant's challenge to the notion of third-party-relief "is not unreasonable and may, in fact, preclude recovery of fees in some other context." *Id.*

proposed expansion of catalyst theory principles to encompass this sort of indirect, third-party relief.

The petition contains a lengthy, but immaterial, analysis of five pre-*Farrar* decisions that Foreman claims support a fee award in this case. Pet. at 22-25 (discussing *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782 (1989); *Rhodes v. Stewart*, 488 U.S. 1 (1988); *Hewitt*, 482 U.S. 755; *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Maher v. Gagne*, 448 U.S. 122 (1980)). Not one of these decisions even remotely contemplates a third-party catalyst situation. In fact, neither *Garland* nor *Rhodes* discusses the implications of non-judicial relief, since plaintiffs in both cases won favorable judgments. Finally, to the extent *Hewitt*, *Hensley*, and *Maher* consider non-judicial relief as a basis for determining prevailing party status, they do so solely with respect to relief provided by a *defendant* acting under pressure of the lawsuit. *See Hewitt*, 482 U.S. at 761; *Hensley*, 461 U.S. at 439 n.15; *Maher*, 448 U.S. at 129-30.

The defendant in this case was Dallas County, not the Texas Legislature or State of Texas. No state law or state action was challenged. No judgment could have been entered against the Legislature or the State, since neither was a party to the suit. In short, the Texas Legislature was under no pressure whatsoever from Foreman's lawsuit. As such, the facts of this case do not comport with the pre-*Farrar* decisions contemplating prevailing party status on the basis of voluntary actions taken by a defendant under pressure of the lawsuit. Nothing about the Fifth Circuit's opinion engaged, much less contravened, any of the pre-*Farrar* decisions cited in the Petition. The Court

should decline Foreman's invitation to render an advisory opinion concerning legal questions on which the Fifth Circuit never ruled.

Far from restricting, much less eviscerating, the catalyst theory, the Fifth Circuit assumed that even Foreman's novel third-party catalyst theory might succeed under appropriate facts.[6] The court determined, however, that the facts here did not prove that Foreman's lawsuit caused the third-party Texas Legislature to indirectly provide the relief sought in the lawsuit. *See* Pet. App. at 12a. ("[E]ven if we assume that the plaintiffs did obtain some relief, there is insufficient evidence of a causal connection between the plaintiffs' individual suit and the Texas legislature's decision to revamp the appointment procedure."). The Fifth Circuit's rejection of Foreman's unprecedented spin on the catalyst theory says nothing about the continued availability of traditional catalyst theory principles to prevailing parties who *do* obtain relief under pressure of the lawsuit. *See Hewitt*, 482 U.S. at 761. In fact, at least twice since *Farrar*, the Fifth Circuit has awarded fees to plaintiffs on a catalyst theory basis. *See Watkins v. Fordyce*, 7 F.3d 453 (5th Cir. 1993); *Pembroke*

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[6] The court noted that "it will be a rare case indeed where a defendant is made to pay attorney's fees for relief that was secured from an independent third-party who was never a party to the lawsuit." Pet. App. at 12a. Nonetheless, the court did consider plaintiffs' third-party catalyst claim, analyzing: first, whether plaintiffs had, in fact, obtained from the third-party Texas Legislature the relief sought in the lawsuit; and, second, whether the plaintiffs' lawsuit had caused the Texas Legislature to act as it did. *See id.* The court ultimately determined that plaintiffs failed to prove either of these two requisite elements under the catalyst theory. *See id.* at 12a-14a.

v. Wood County, 981 F.2d 225 (5th Cir. 1993). What *Foreman* demonstrates, if anything, is the Fifth Circuit's willingness to consider even new twists on the catalyst theory post-*Farrar*. On the facts of this case, however, the court was not persuaded to stretch the catalyst theory to encompass the type of indirect relief Foreman claimed he obtained from the third-party Texas Legislature, as opposed to the defendant, Dallas County.

At base, Foreman quibbles with the Fifth Circuit's view of the facts. Foreman has not identified any aspect of the Fifth Circuit's holding that causes or exacerbates a circuit conflict or in any way diminishes the availability of the catalyst theory to plaintiffs who informally obtain relief from the defendant – or, for that matter, a third party – who acts under pressure of the lawsuit. Foreman may wish to pique the Court's interest by bootstrapping intriguing questions of law onto the Fifth Circuit's explicitly fact-based opinion. The Court should not be misled: *Foreman* simply does not present these questions. Because the Fifth Circuit never held that the catalyst theory is a dead letter, nor that a third-party catalyst theory fails as a matter of law, these issues are not before the Court. It would be premature for the Court to address such hypothetical legal questions in the context of the Fifth Circuit's purely fact-oriented opinion. *Cf. Friends*, ___ U.S. ___, 120 S. Ct. at 711-12; *O'Neill*, 359 U.S. at 8.

II. The Facts of this Case Do Not Present the Second Question on Which Foreman Asks the Court to Grant Certiorari – Whether Plaintiffs in a Section 5, Voting Rights Act, Enforcement Action Prevail by Forcing Defendants to Replace an Unprecleared, Discriminatory Procedure with a Precleared, Non-Discriminatory One.

A. The record contains no determination that any procedure used by Dallas County in the appointment of election judges was either discriminatory or non-discriminatory.

As its second "question presented," Foreman asks if plaintiffs prevail in a section 5 enforcement action when they force defendants to replace a racially discriminatory voting procedure with a non-discriminatory procedure. This question, like others raised by Foreman, is not presented by the facts of this case.

No court ever determined that the procedure adopted by Dallas County in October 1996 and challenged by Foreman in this lawsuit was racially or ethnically discriminatory. Nor did any court determine that the procedure adopted in compliance with the 1997 legislation was non-discriminatory. This suit was an enforcement action under section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. Section 5 enforcement courts have extremely limited jurisdiction, and the issue of whether the voting procedure is, or is not, discriminatory is expressly foreclosed. *See Lopez v. Monterey County, Cal.*, 519 U.S. 9, 23 (1996); *Perkins v. Matthews*, 400 U.S. 379, 385 (1971). The district court here quite properly did not address that issue. Were this Court to grant Foreman's petition, there would be no lower court finding to review

for purposes of answering the question Foreman poses. Any opinion this Court might issue would be an advisory opinion on a hypothetical set of facts.

B. As this Court previously found, the record in this case is insufficient to establish whether the October 1996 procedure required preclearance.

Foreman's second question implicitly and improperly assumes that Dallas County's October 1996 election procedure required preclearance. However, preclearance would be required only if Dallas County's October 1996 practice differed from the one in effect on November 1, 1972. *See Foreman v. Dallas County*, 521 U.S. 979, 980-81 (1997); Pet. App. at 32a. This Court has already determined that "the record is silent as to the procedure used by Dallas County for appointing election judges as of November 1, 1972, [and thus] we cannot make a final determination here as to whether preclearance is in fact required." *Id.* 521 U.S. at 981; Pet App. at 33a. On remand, the case was dismissed, primarily on grounds of mootness; thus, no finding was made on that question. *See Foreman*, 990 F. Supp. at 509 n.10. There has never been a factual determination whether the October 1996 election procedure was the same as the procedure in effect on November 1, 1972.

Absent a determination that preclearance was, in fact, required, there is no ruling in this case that permits the Court to address Foreman's second "question presented." The hypothetical issue of whether a section 5 plaintiff who forces a defendant to replace a procedure that required, but never obtained, preclearance with a

precleared procedure is not presented on the facts of Foreman's case. The Court should deny the petition. *See New York v. O'Neill*, 359 U.S. 1, 8 (1959).

CONCLUSION

For these reasons, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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No. 99-1334

IN THE
Supreme Court of the United States

B.C. FOREMAN, IDA CLARK, OTIS TARVER, LOUIS DAVIS, and MANDY PESINA,
Petitioners,

v.

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY BRIEF

Although respondents congratulate the Fifth Circuit for "faithfully appl[ying] established catalyst theory principles," Resp. Br. at 8, the Fifth Circuit has actually eviscerated the catalyst theory. To paraphrase Abraham Lincoln's old saw about calling a dog's tail a "leg," respondents can call the Fifth Circuit's new test the "established catalyst theory," but just calling it that won't make it so.[1]

[1] Lincoln supposedly asked the riddle: "If you call a tail a 'leg,' how

(continued...)

Respondents thus are wholly unsuccessful in attempting to evade the central *substantive* problem raised by the decision below: In the wake of that decision, civil-rights plaintiffs in the Fifth Circuit (as well as the Fourth Circuit) can no longer recover attorneys' fees under the catalyst theory. Moreover, none of the diversionary *procedural* arguments raised by respondents refutes the compelling arguments for review raised by the Petition.

I. No Catalyst-Theory Plaintiff Could Satisfy the Fifth Circuit's Novel Test.

The traditional catalyst theory is clearly defined in the leading treatise on court-awarded attorneys' fees: "If a case *does not proceed to judgment on the merits* because it is mooted by the unilateral action of the defendant in providing *some measure* of the relief sought, the plaintiff is a prevailing party if [he] can establish that the suit was a 'catalyst' for the defendant's mooting of the suit."[2] Thus, the catalyst theory is available only in cases that become moot because the defendant capitulates *before* the court can enter final judgment on the merits.

But under the Fifth Circuit's radically revamped test, a plaintiff can prevail only by obtaining "*final* . . . merit-based relief." Pet. App. 15a (emphasis added); *see* Pet. at 9, 14-16.

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[1](...continued)
many legs would a dog have?" The answer: "Four. Calling a tail a leg doesn't make it so." JAMES C. HUMES, THE WIT AND THE WISDOM OF ABRAHAM LINCOLN 194 (1996).

[2] 1 MARY FRANCIS DERFNER & ARTHUR D. WOLF, COURT AWARDED ATTORNEY FEES ¶ 8.03[2][a][ii][C], at 8-20 (1999) (emphasis added) (citing cases); *accord* 1 *id.* ¶ 9.02[4][c], at 9-21; 3 *id.* ¶ 34.03[3][a][ii][E], at 34-15.

And the "final remedy" obtained must be perfectly congruent with the relief the plaintiff requested in the complaint. Pet. App. 11a-12a, 15a; *see* Pet. at 9-10, 16-18.

These requirements on their face constitute a repeal of the catalyst theory as it has traditionally been understood. They would deny attorneys' fees regardless of the amount or type of voluntary compliance caused by a lawsuit – whenever that compliance prevented entry of a formal judgment in favor of the plaintiff giving the precise relief sought in the complaint.[3]

Not surprisingly, respondents fail to cite a single case in which a plaintiff could have recovered attorneys' fees under the Fifth Circuit's new test. Since this Court announced its decision in *Farrar v. Hobby*, 506 U.S. 103 (1992), the Courts of Appeals have held that catalyst-theory plaintiffs were "prevailing parties" in 17 cases, spanning ten circuits over a

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[3] For the traditional view of the catalyst theory, see *Hewitt v. Helms*, 482 U.S. 755, 760-61 (1987) (If a lawsuit produces "a change in conduct that redresses the plaintiff's grievances . . . , the plaintiff is deemed to have prevailed despite the absence of a formal judgment in his favor.") (citing *Maher v. Gagne*, 448 U.S. 122, 129 (1980)); *Aubin v. Fudala*, 782 F.2d 287, 291 (1st Cir. 1986) (Breyer, J.) ("'[V]ictory' in a civil rights suit is typically a practical, rather than a strictly legal matter. . . . [W]hen a plaintiff's lawsuit acts as a 'catalyst' in prompting defendants to take action to meet plaintiff's claims, attorney's fees are justified despite the lack of judicial involvement in the result.") (citation and internal quotation marks omitted); *Koster v. Perales*, 903 F.2d 131, 134-35 (2d Cir. 1990) ("A plaintiff may be considered a prevailing party even though the relief ultimately obtained is not identical to the relief demanded in the complaint, provided the relief obtained is of the same general type."); *Institutionalized Juveniles v. Secretary of Public Welfare*, 758 F.2d 897, 912 (3d Cir. 1985) ("[P]laintiffs will be prevailing parties even though the relief they obtained is not identical to the relief they specifically demanded, as long as the relief obtained is of the same general type. . . . [T]he important thing is what relief was [actually obtained], not what relief was expressly requested by the pleadings.") (citation and internal quotation marks omitted).

seven-year period.[4] If those courts had applied the test that the Fifth Circuit enunciated below – rather than the traditional catalyst theory – the plaintiffs would have lost all 17 of those cases because *none* involved plaintiffs who had obtained a "final remedy" precisely matching their earlier prayer for relief.

As a practical matter, then, there is simply no difference between adopting the Fifth Circuit's new, so-called "catalyst theory" test and abolishing the theory outright, as the Fourth Circuit did in *S-1 & S-2 v. State Board of Education*, 21 F.3d 49, 51 (4th Cir.) (*en banc*) (*per curiam*), *cert. denied*, 513 U.S. 876 (1994). The probability of a plaintiff recovering attorneys' fees on a catalyst claim is now the same in either circuit: precisely zero. Thus, this case squarely presents the primary question petitioners have asked the Court to resolve: whether the catalyst theory survived *Farrar*.

Respondents point to the Fifth Circuit's alternative holding that petitioners presented insufficient evidence of causation –

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[4] *Holmes v. Millcreek Township Sch. Dist.*, No. 98-3428, — F.3d —, 2000 WL 215655, *9-*10 (3d Cir. Feb. 24, 2000); *Williams v. Hanover Hous. Auth.*, 113 F.3d 1294, 1297-300 (1st Cir. 1997); *Haley v. Pataki*, 106 F.3d 478, 482-84 (2d Cir. 1997); *St. Louis Fire Fighters Ass'n v. City of St. Louis*, 96 F.3d 323, 330-32 (8th Cir. 1996); *Stivers v. Pierce*, 71 F.3d 732, 751-54 (9th Cir. 1995); *Johnson v. Lafayette Fire Fighters Ass'n Local 472*, 51 F.3d 726, 730-31 (7th Cir. 1995); *Doty v. County of Lassen*, 37 F.3d 540, 547-48 (9th Cir. 1994); *Zinn v. Shalala*, 35 F.3d 273, 274-76 (7th Cir. 1994); *Beard v. Teska*, 31 F.3d 942, 950-55 (10th Cir. 1994); *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist., #1*, 17 F.3d 260, 262-63 (8th Cir. 1994); *Watkins v. Fordice*, 7 F.3d 453, 456-57 (5th Cir. 1993); *Phelan v. Bell*, 8 F.3d 369, 373-74 (6th Cir. 1993); *Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater*, 2 F.3d 1509, 1513-14 (11th Cir. 1993), *cert. denied*, 513 U.S. 807 (1994); *Wilderness Soc'y v. Babbitt*, 5 F.3d 383, 386-89 (9th Cir. 1993); *Paris v. United States Dep't of Hous. & Urban Dev.*, 988 F.2d 236, 239-42 (1st Cir. 1993); *Citizens Against Tax Waste v. Westerville City Sch.*, 985 F.2d 255, 257-58 (6th Cir. 1993); *Pembroke v. Wood County*, 981 F.2d 225, 230-31 & n.27 (5th Cir. 1993).

suggesting that this holding should serve to insulate from review the court's earlier effective repeal of the catalyst theory. *See* Resp. Br. at 6-8. But the *basis* on which the Fifth Circuit rejected petitioners' evidence only *heightens* the argument for review. The court held inadmissible the most direct evidence of legislative motive – affidavits of those involved – thus making it all but impossible to prove a catalyst claim in many situations. *See* Pet. App. 13a-14a. There is no doubt that, absent that unwarranted exclusion, petitioners' unrebutted evidence of causation was sufficient to justify a fee award. Indeed, the only two judges to have considered the full range of evidence – the District Judge and the dissenter in the Fifth Circuit – had no trouble reaching that conclusion. Pet. App. 21a-27a, 42a-48a.[5]

The bottom line is that, if the Court were to grant review, this case would provide an excellent vehicle both for resolving an acknowledged and glaring conflict over the validity of the catalyst theory, *see Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 120 S. Ct. 693, 711 (2000), and for clarifying the precise test the lower courts should apply, *see Marbley v. Bane*, 57 F.3d 224, 235 (2d Cir. 1995) (describing variations among the circuits' catalyst-theory tests); *see also Long v. Bonnes*, 455 U.S. 961, 962-67 (1982) (Rehnquist, J., joined by O'Connor, J., dissenting from a denial

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[5] Respondents misleadingly suggest that the Fifth Circuit "looked at all the evidence in the record" before rejecting the District Court's finding of causation. Resp. Br. at 8. In fact, the court refused to give any weight to the affidavits and relied instead on the fact that a similar (though unsuccessful) bill had been introduced in a prior legislative session, before the lawsuit was filed. *See* Pet. App. 13a-14a & n.7. In so doing, as Judge Stewart explained in dissent, Pet. App. 24a-25a, the court was able to disregard the unrebutted sworn testimony that this lawsuit played a substantial role in the re-introduction and passage of the law that forced respondents to change their practices.

of certiorari) (same). Respondents' efforts to show otherwise are unavailing.

II. Respondents' Procedural Arguments Lack Merit.

Rather than address the central substantive point of the Petition – that the Fifth Circuit, like the Fourth, has dealt the catalyst theory a fatal blow – respondents offer a laundry list of procedural quibbles, each of which is inaccurate, irrelevant, or both.

First, respondents hint that, even if this Court granted certiorari, upheld the catalyst theory, and found that petitioners had obtained the relief they sought, it still would have to affirm the judgment below because petitioners could not prove a causal link between the lawsuit they filed against the County and the new statute enacted by the Texas Legislature. *See* Resp. Br. at 7-12. As noted, part of this argument depends on the incorrect assumption that the Fifth Circuit properly excluded from consideration the best evidence of causation – sworn testimony from the legislators involved. The other piece is respondents' assertion that there is something "novel," "unique[]," "expansive," or "unprecedented" about what they term the "*third-party* catalyst" theory. Resp. Br. at 8-9, 11.

In reality, however, petitioners' theory was quite conventional. When the actions of a third party moot a lawsuit, courts routinely order defendants to pay plaintiffs their attorneys' fees if "the suit was the catalyst for the actions of the third party and the defendant is in some sense bound by [the third party's] actions."[6] Thus, here, petitioners had every

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[6] 1 DERFNER & WOLF, *supra* note 2, ¶ 9.02[4][c], at 9-28 (citing cases); *see, e.g.*, *Paris*, 988 F.2d at 241 (holding that plaintiffs were eligible

(continued...)

reason to claim that their voting-rights suit was the catalyst for the Texas Legislature's enactment of the statute, which legally bound the County as a political subdivision of the State of Texas. Indeed, the facts here were even better than in some "third party" cases, because this case was not dismissed for mootness until *after* the County – a named defendant – finally abided by the precleared state statute (which had, by then, been in effect for several weeks), abandoned the 1996 election procedures that were the target of the lawsuit, and reappointed the six plaintiffs and several dozen other African-American and Hispanic election judges. *See* Pet. App. 6a & n.3, 38a & n.3.

Second, respondents attempt to separate the Fifth Circuit's discussion of the TRO, and its requirement of a "final remedy," Pet. App. 15a, from the court's discussion of the catalyst theory. Resp. Br. at 5. But the District Court had held that the TRO was a "significant catalyst" in causing respondents to rescind their unprecleared September 1996 procedure for selecting election judges. Pet. App. 39a. The Fifth Circuit reversed that ruling on the ground that preliminary relief cannot, in principle, create a prevailing party because it is not a "final remedy" altering the "'legal relationship'" of the parties, Pet. App. 15a (quoting *Farrar*, 506 U.S. at 111) – even where, as here, the TRO caused the permanent abandonment of

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[6](...continued)
for fees because their litigation efforts caused Congress, a nonparty, to alter the defendants' challenged tenant-selection policies); *Rose v. Heintz*, 806 F.2d 389, 389-92 (2d Cir. 1986) (reversing a denial of attorneys' fees because plaintiffs' motion for a preliminary injunction led the Federal Government to change its policy, which in turn forced the defendant state agency to change *its* policy and thereby moot plaintiffs' lawsuit); *Institutionalized Juveniles*, 758 F.2d at 917 (rejecting "defendants' argument that the law's changes . . . were not attributable to them because the changes were enacted by the [Pennsylvania] legislature," which was not a party to the lawsuit).

one set of allegedly illegal practices. *See* Pet. App. 19a, 27a. A clearer rejection of the catalyst theory is hard to imagine.

Third, respondents assert that petitioners are procedurally barred from placing any reliance on their victory in the prior Supreme Court phase of this case – a phase in which petitioners won a total vindication of the principle that changes in the method for selecting election judges are subject to preclearance. Pet. App. 32a-33a; *see* Pet. at 5, 17 & n.8. The claim is that, because the District Court did not rely on this ground, and because petitioners did not cross-appeal, they are barred from raising this point now. Resp. Br. at 2, 6. That argument is simply wrong. Petitioners were declared "prevailing parties" and were awarded every dime of fees they had requested, Pet. App. 48a-49a, and were thereafter entitled to raise any available alternative theory to support that judgment.[7]

Fourth, respondents suggest that this case resembles *Friends of the Earth*, 120 S. Ct. at 711-12, in that both are flawed vehicles for resolving the circuit split on the catalyst theory. *See* Resp. Br. at 4, 12. That comparison is inapt. In *Friends of the Earth*, the district court had neither denied nor awarded any attorneys' fees. *See* 120 S. Ct. at 712. Here, by contrast, the District Court granted the petitioners' motion for fees in full, Pet. App. 49a, and the appellate court reversed that

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[7] *See United States v. Raines*, 362 U.S. 17, 27 n.7 (1960) ("[S]ince the judgment of the District Court awarded appellees all the relief they requested (despite rejecting most of their contentions, except the central one), no cross-appeal was necessary . . . ."); *see also Schweiker v. Hogan*, 457 U.S. 569, 585 & n.24 (1982) (allowing appellees to assert an argument as a basis for affirming the district court's judgment, even though they had neither advanced that argument below nor filed a cross-appeal); *1488, Inc. v. Philsec Inv. Corp.*, 939 F.2d 1281, 1292 n.7 (5th Cir. 1991) (explaining that an appellee in the Fifth Circuit may advance arguments the district court rejected).

award outright (and even refused to remand the case), Pet. App. 2a.

Fifth and finally, respondents rely on the fact that there was never a final adjudication that their challenged methods for selecting election judges were discriminatory or that the second of those challenged methods actually required preclearance. Resp. Br. at 13-15. But those facts are, of course, irrelevant. If the catalyst theory is valid, it is sufficient that petitioners made these allegations and caused respondents to abandon the challenged practices.

CONCLUSION

The Court should grant the petition for a writ of certiorari to determine whether respondents, and the Fifth Circuit, are correct that defendants can avoid fee liability by unilaterally mooting a case before a final adjudication of liability can be entered.

Respectfully submitted,

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